No. 92-1945

Supreme Court
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IN THE
Supreme Court of the United States
October Term, 1992

THE PITTSTON COMPANY, *et al.*,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "clear and unmistakable" intent requirement for employee waivers of a bargaining right, enunciated in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), apply to the construction of a contract that purportedly deprives an employer of its bargaining right to choose its bargaining representative, potentially in perpetuity?

2. Faced with conflicting evidence concerning a genuine issue of material fact, may a court, consistent with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), grant a motion for summary judgment on the basis that an employer waived its right to select its bargaining representative a) without applying the movant's special trial burden of establishing waiver by clear and unmistakable proof to the motion for summary judgment and b) by weighing evidence and drawing inferences in favor of the movant?

3. May a court refuse to apply the doctrine of judicial estoppel and instead permit a party to maintain an action based on a theory that is contrary to one which that party has repeatedly and successfully asserted in prior actions?

PARTIES TO THE PROCEEDING

Petitioners, Pittston Coal Group, Inc., Buffalo Mining Company, Clinchfield Coal Company, Eastern Coal Corporation, Elkay Mining Company, High Spur Coal Company, Jewell Ridge Mining Corporation, Kentland-Elkhorn Corporation, Meadow River Company, Ranger Fuel Corporation, Sea "B" Mining Company, Sewell Coal Company, Snap Creek Coal Company and Wolverine Mining Company (hereinafter referred to collectively as, "Pittston" or the "Pittston Companies"), all of which are directly or indirectly owned by The Pittston Company, were defendants-appellants in Civil Action No. 88CV969 below. In a supplemental opinion, the district court held that its summary judgment decision did not extend to defendants Thames Development, Ltd. or to The Pittston Company. *See UMWA 1974 Pension Trust v. The Pittston Co.*, 793 F. Supp. 339, 348 (D.D.C. 1992).

In addition, Rawl Sales and Processing Company was a defendant-appellant below and filed a petition for a writ of *certiorari* on May 7, 1993, No. 92-1775, which is now pending before this Court. Pittston and Rawl Sales and Processing Company will be collectively referred to as "petitioners".

Respondents, all of whom were plaintiffs-appellees below, are the trustees of the United Mine Workers of America 1950 Pension Plan and Trust, the United Mine Workers of America 1950 Benefit Plan and Trust, the United Mine Workers of America 1974 Pension Plan and Trust and the United Mine Workers of America 1974 Benefit Plan and Trust.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The PITTSTON COMPANIES respectfully petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit is reported at 984 F.2d 469 (D.C. Cir. 1993) and is reprinted in the Appendix ("App.") to this petition at 1a-16a. This decision affirmed the summary judgment order of the United States District Court for the District of Columbia, which is reported at 782 F. Supp. 658 (D.D.C. 1992) and is reprinted at App. 17a-47a. A supplemental opinion of the district court, which, among other things, certified its decision for interlocutory review and denied

a motion for reconsideration, is reported at 793 F. Supp. 339 (D.D.C. 1992) and is reprinted at App. 50a-67a.[1]

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the D.C. Circuit was entered on February 2, 1993, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 31, 1993. (App. 48a, 49a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the following statutes:

29 U.S.C. § 151. Findings and policies:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection".

29 U.S.C. § 158(b):

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances".

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[1] Citations to the Joint Appendix filed in the United States Court of Appeals for the D.C. Circuit are to the first page of those documents in the Joint Appendix and are designated as "JA ____".

This case also concerns the interpretation of Fed. R. Civ. P. 56(c), which provides:

> "Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages".

STATEMENT OF THE CASE

In 1978, the Bituminous Coal Operators Association ("BCOA")—a multiemployer bargaining unit comprised of coal producers—and the United Mine Workers of America ("UMWA") negotiated the 1978 National Bituminous Coal Wage Agreement ("NBCWA"), a collective bargaining agreement. The 1978 NBCWA had a term of three years and required "signatory" coal operators to make contributions "during the life of this agreement" to both the UMWA 1950 Pension and Benefit Funds and the 1974 Pension and Benefit Funds (the "Trusts"), which had been created to provide benefits to miners, retirees and their families. Specifically, Article XX(d)(1) provided: "*During the life of this Agreement* . . . each *signatory* Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below". JA 710, reprinted at App. 68a (emphasis added). The NBCWA was thereafter renegotiated in 1981 and 1984.

Certain of the Pittston Companies were signatories to one or more of the 1978, 1981 and 1984 NBCWAs. In May 1987, however, those companies lawfully withdrew from the BCOA because they believed that their interests on many critical issues, including pension and health matters, differed from those of the

dominant coal companies that controlled the BCOA, and accordingly, they did not want to be represented by the BCOA in negotiations for a successor agreement to the 1984 NBCWA. Pittston commenced independent negotiations with the UMWA in November 1987, prior to the expiration of the 1984 NBCWA. The next two years were marked by a very difficult labor dispute, including an often violent ten month strike and filing of numerous legal proceedings to exert pressure on Pittston to accept the UMWA's demands.

One of the most significant issues in these negotiations was Pittston's continued participation in the UMWA Trusts. Finally, after over two years of bargaining and with the assistance of federal mediators appointed by the Secretary of Labor, the parties reached an agreement that resolved all matters, including pension and health benefits, to their mutual satisfaction. That agreement, which was ratified by the UMWA membership, provided for generous pension and health benefits for miners and retirees alike, including a $10 million payment and certain continued contributions to the UMWA Trusts.

While Pittston was engaged in these negotiations with the UMWA, it learned, for the first time, of respondents' novel claim that an obscure provision in the separate trust documents incorporated by reference into the 1978, 1981 and 1984 NBCWAs—referred to in this litigation as the "evergreen" clause—allegedly subjected signatories to those agreements to continuing and potentially *perpetual* obligations to contribute to the Trusts at rates negotiated by the BCOA in future NBCWAs, including the 1988 NBCWA.[2] Under respondents' theory,

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[2] The "evergreen" clause states in relevant part: "Any Employer . . . who was or is required to make . . . contributions to the [Trust], is obligated and required to comply with the terms and conditions of the [Trust], as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984". JA 739, reprinted at App. 76a.

signatories to those agreements were subject to a continuing obligation to contribute to the UMWA Trusts at rates set in future NBCWAs whether or not the signatories to those prior NBCWAs became a party to the current agreement, whether or not they entered into an independent successor agreement with different contribution rates to the Trusts and whether or not their employees remained members of the UMWA.

Pursuing their new theory, respondents brought an action under 29 U.S.C. §§ 1001 *et seq.* (ERISA) and § 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185(a), to recover contributions allegedly owed by signatories to the 1978, 1981 or 1984 NBCWAs. Pittston moved for summary judgment asserting, *inter alia*, that the plain language of the NBCWAs was flatly contradictory to respondents' current assertions. Respondents subsequently made a cross-motion for summary judgment against petitioners, relying upon extrinsic evidence created thirteen years after the 1978 negotiations and solely for the purpose of this litigation.

At no time during the ten years between the 1978 NBCWA and the filing of this lawsuit, had anyone—including respondents, the UMWA and the BCOA—ever made any reference to the so-called evergreen clause or suggested to Pittston that it had assumed such extraordinary contribution obligations by signing the three NBCWAs. To the contrary, prior to this lawsuit, respondents, the BCOA and the UMWA had all engaged in conduct that was directly contrary to respondents' new theory. Above all, respondents repeatedly took the position in other litigations—consistent with the language of the NBCWA and NLRB decisions interpreting that agreement[3]—that a signatory coal company's obligation to contribute to the Trusts did *not* extend beyond the term of the NBCWA. The BCOA never raised any questions regarding respondents' legal positions in those

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[3] In *Garland Coal & Mining Co.*, NLRB Case No. 16-CA-9999 (1981), the NLRB, though confronted with the evergreen clause, concluded that employers who were parties to an NBCWA have no obligation to contribute to the Trusts after the agreement expires. JA 999. In *A.T. Massey Coal Co.*, NLRB Case No. 9-CA-23241 (1987), the NLRB again reached the same conclusion.

earlier actions, and the BCOA never disclosed to petitioners even the possibility that any continuing obligations were created by the NBCWAs. Similarly, the UMWA—the party with whom the BCOA allegedly agreed to continuing obligations in the 1978 NBCWA—negotiated, agreed to and ratified (by its members) a successor contract with the Pittston Companies premised on the fact that the parties to that agreement were free to negotiate pension and health issues. Indeed, the UMWA appeared as *amicus curiae* in this action in support of petitioners.

Substantial evidence supported petitioners' interpretation of the evergreen clause—that the clause sets forth the requirement that contributions to the Trusts shall be made *during the term of the collective bargaining agreement* pursuant to the terms of the NBCWA or other successor collective bargaining agreement to which the employer was a signatory, "including, but not limited to, the [NBCWA] of 1984". That interpretation is much less onerous, more plausible *and* more importantly—unlike respondents'—entirely consistent with both Article XX of the collective bargaining agreement (the NBCWA) into which the clause was incorporated by reference, and the conduct of the parties during the decade following the 1978 NBCWA. Petitioners pointed out that respondents' construction of the evergreen clause would have departed from the BCOA's and the UMWA's practice of leaving all issues open for negotiation at the expiration of each NBCWA. Petitioners argued that the evergreen clause's reference to "successor agreements" encompassed Pittston's contract with the UMWA which included provisions for pension and health benefits acceptable to the UMWA members employed by Pittston.

Petitioners submitted substantial and compelling evidence in opposition to respondents' motion for summary judgment. *First*, petitioners proved that respondents had consistently and repeatedly asserted in other litigations that a coal company's obligation to contribute to the Trusts was not continuing, but ceased with the expiration of the contract under which the obligation was assumed. In these other litigations, respondents had sought withdrawal liability, which arises only if the coal company's obligation to contribute has terminated, and which, therefore, is thoroughly inconsistent with respondents' position

here as to the scope of the evergreen clause. *See* 29 U.S.C. § 1383(a)(1). For example:

- In *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986), the Trustees alleged that "B&W Coal did not sign the 1981 Bituminous Coal Wage Agreement. . . . Consequently, B&W Coal permanently ceased to have an obligation to contribute to the Plans on March 27, 1981, the expiration date of the 1978 Agreement". JA 1034.

- In *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1777 (1986) (Dreyer, Arb.), the Arbitrator upheld the Trustees' position that "[t]here is no dispute that Garland's contractual obligation to contribute to the Plans ceased on March 27, 1981 . . . . The Wage Agreement expired on March 27, 1981, and Garland's contractual obligation to contribute to the Plans ceased at that time". JA 1005.

- In *Connors v. Mulvehill*, 679 F. Supp. 1071, 1073-1074 (N.D. Ala. 1988), the Trustees asserted that the corporation had "an alleged withdrawal liability to the Funds", following the expiration of the collective bargaining agreement between the corporation and the UMWA.

- In *Combs v. Pelbro Fuel, Inc.*, 4 Employee Benefits Cas. (BNA) 2610 (D.D.C. 1984), the Trustees alleged that, "[a]s a result of the cessation of an obligation to contribute to the 1950 Pension Trust and/or the 1974 Pension Trust [in light of the expiration of the 1978 NBCWA and defendant's failure to sign the 1981 NBCWA], defendant has withdrawn from both of the Trusts as that term is defined in Section 4203(a) of ERISA, 29 U.S.C. §1383(a)". JA 1020. Summary judgment was granted for the Trustees.

Second, petitioners pointed out that Trustee Pierce, a participant in the negotiations of the 1978 NBCWA and one of respondents' declarants, had made statements at a meeting of the Board of Trustees of the UMWA Trusts in 1988 that indicated

that Pierce believed that coal companies that were signatories to the 1978, 1981 or 1984 NBCWA did not have a continuing obligation to pay into the Trusts. JA 921.

Third, in support of a motion for reconsideration, petitioners submitted further evidence of inconsistent conduct by the Trustees:

- A "Q&A" on withdrawal liability that was ratified by the Trustees on August 26, 1981, stated that "[a] complete withdrawal occurs . . . only if the cessation of an employer's obligation to contribute . . . is permanent. For example, complete withdrawal occurs where . . . (c) an employer becomes non-signatory". JA 1069.
- In *Kelley Coal v. UMWA Pension Trust*, N.D. W.Va., Civ. Action No. 87-0089-C(K), the Trustees took the position, *after* the filing of this lawsuit, that Kelley Coal "permanently ceased to have an obligation to contribute to the 1950 Pension Plan as of September 30, 1984", when the 1981 NBCWA expired and it did not enter into a successor agreement providing for such contributions. JA 1038.

Fourth, in support of their motion for reconsideration, petitioners also submitted affidavits from two members of the BCOA Executive Committee, which was responsible for directing the BCOA Benefits Subcommittee members, and from another BCOA participant in the 1978 negotiations. Each of those affiants was directly involved in the negotiation of the 1978 NBCWA. Each affiant denied any knowledge of any continuing obligation and stated that he believed that the coal companies' obligation to contribute to the Trusts ceased with the expiration of the agreement. JA 866, 884, 888.

Fifth, in support of their motion for reconsideration, petitioners also submitted affidavits from senior officers of Rawl, A.T. Massey (Rawl's parent) and Pittston. JA 813, 838, 870, 876. Each of these affiants, as well as the three 1978 participant affiants, described above, declared that prior to the commencement of this litigation, neither respondents, the UMWA

nor the BCOA had ever indicated to them, nor were they aware, that anyone believed the evergreen clause was intended to create continuing obligations. On the contrary, one affiant attached a chronology of the 1978 NBCWA negotiations that was prepared by the BCOA and distributed to its members on September 1, 1978. This chronology highlighted significant aspects of the 1978 agreement but made no mention whatsoever of any continuing contribution obligation. JA 842. Moreover, another affiant recalled that in 1984 the BCOA president advised BCOA members that those members who did not wish to be bound by the terms of the NBCWA then being negotiated were free to withdraw. JA 876.

Last, but not least, petitioners pointed out that the 1988 NBCWA, which incorporated the same form of evergreen clause, also provided for withdrawal liability with respect to Benefit Funds when an employer ceased to be obligated to contribute to the Trusts under certain circumstances, including "failure of the Employer to execute a successor Agreement following the expiration of this or any successor Agreement". 1988 NBCWA Article XX(i)(2). JA 996, reprinted at App. 77a. If the UMWA and the BCOA had believed that the evergreen clause already included a continuing obligation to contribute, then a withdrawal liability provision would have been totally superfluous.[4]

On the basis of all of this evidence, and more, petitioners argued, *first*, that summary judgment could not—consistent with the decisions of this Court—be granted for respondents in the face of substantial evidence that no one believed that any signatory

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[4] Petitioners also introduced evidence concerning a dispute between respondents and the A. T. Massey Coal Company. During that dispute in 1988, respondents' outside counsel (Shea & Gardner), concluded that the NBCWA did not impose any continuing obligation to contribute to the UMWA Trusts and that if Massey did not enter into the 1988 NBCWA but instead signed an independent agreement with the UMWA, it would have no obligation to contribute to the Trusts pursuant to the 1988 NBCWA but instead would be obligated to make whatever contributions were required by its independent agreement. Memorandum to Trustees of UMWA Health and Retirement Funds from Shea & Gardner, 6/6/88 at 13-17. JA 1073.

employer to the 1978 NBCWA had bound itself to any obligation to contribute to the Trusts which survived the termination of that agreement. *Second*, petitioners argued that respondents' prior inconsistent conduct warranted the application of judicial estoppel to bar respondents from now taking a totally contrary position before the district court. *Third*, petitioners argued that respondents' novel interpretation of the so-called evergreen clause would amount to a waiver of the right of any individual employer of the BCOA to select its own bargaining representative and that, at the least, this required "clear and unmistakable" proof that petitioners intended to waive their right to select their bargaining representative, under the standard for statutory waivers which this Court established in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

Notwithstanding petitioners' substantial evidence of the parties' intent (including respondents' prior inconsistent conduct) and the fact that respondents' interpretation effected a waiver of important collective bargaining rights, the district court granted summary judgment for respondents and held that the so-called evergreen clause imposed continuing and potentially perpetual obligations on signatories to the NBCWAs. (App. 46a) In doing so, the district court expressly recognized that: (i) the contract was "ambiguous" (App. 26a); (ii) respondents' prior inconsistent conduct and assertions in other litigation were "greatly troubl[ing]" (App. 46a); (iii) whether Trustee Pierce's 1988 statement was an indication of the intent of the evergreen clause was a "difficult question" (App 33a); and (iv) respondents' interpretation of the evergreen clause *would* result in Pittston's waiver, potentially in perpetuity, of the right to negotiate with its employees' representative concerning pension and health benefits. (App 34a-38a) Nevertheless, because it concluded that respondents' extrinsic evidence—most notably, untested declarations by certain members of the Benefits Subcommittee who participated in the 1978 NBCWA negotiations—"greatly outweighed" petitioners' evidence, the district court granted summary judgment for respondents. (App. 46a)

On interlocutory appeal, the court of appeals affirmed the grant of summary judgment. *UMWA 1974 Pension Trust v. The*

Pittston Co., 984 F.2d 469 (D.C. Cir. 1993). Like the district court, the court of appeals drew critical inferences in favor of respondents. First, the court inferred a possible "business" reason for respondents' inconsistent conduct, rather than inferring that respondents' conduct reflected their views as to the meaning of the evergreen clause and that respondents may have been consciously manipulating the judicial system by adopting inconsistent litigation positions when convenient. (App. 9a-10a) Second, the court dismissed the evidence of the 1988 NBCWA's provision for benefit plan withdrawal liability and inferred that this provision applied only if "no new NBCWA is enacted". (App. 9a, n.8) Third, the court held that petitioners' affidavits were irrelevant (App. 12a), even though the affidavits cast substantial doubt on (i) whether the issue of continuing obligations was ever discussed by the 1978 NBCWA negotiators, and (ii) whether petitioners were ever actually aware of the possibility of continuing obligations and were in a position knowingly to waive rights which would effectively be waived if those continuing obligations were imposed.

The court of appeals disagreed, however, with the district court that respondents' interpretation of the evergreen clause amounted to a waiver of the employers' rights to bargain in the future. Instead, the court of appeals determined that Pittston's acceptance of the evergreen clause, potentially in perpetuity, was merely "a valid exercise of bargaining rights". (App. 16a) Furthermore, the court of appeals refused to apply the doctrine of judicial estoppel to respondents' prior inconsistent conduct in litigation because the D.C. Circuit, unlike other circuits, does not recognize the doctrine, and because the court found no indications that respondents had deliberately set out to manipulate the court system or unfairly burden petitioners. (App. 13a-14a)

REASONS FOR GRANTING THE WRIT

The decisions below will have a profound and disruptive impact on collective bargaining in the coal industry, affecting not only the numerous coal companies which, like Pittston, lawfully withdrew from the BCOA, but also many companies which signed "me too" contracts with the UMWA agreeing to the terms of the

then current NBCWA and, like Pittston, were never told of any continuing obligation.[5]

The decisions here potentially involve liabilities well in excess of one hundred million dollars—most of which will directly benefit larger coal companies who remain members of and dominate the BCOA, rather than the beneficiaries of the Trusts, at the expense of smaller companies and their employees.[6] As a result of the decisions here, former BCOA members like Pittston, and companies that signed "me too" contracts, are effectively unable to select their own bargaining representative to negotiate the critical issues of pension and health benefits. Instead, these companies will be bound by whatever obligations their competitors, the dominant coal companies in the United

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[5] Similar actions are currently pending in both the D.C. and Fourth Circuits against numerous companies. *See Connors v. Link Coal Co., Inc.*, 970 F.2d 902 (D.C. Cir. 1992); *UMWA 1974 Pension Trust v. A & E Coal Co., Inc.*, C.A. No. 88-1126 (D.D.C.); *UMWA 1974 Pension Trust v. Aloe Coal Co.*, C.A. No. 91-0207 (D.D.C.); *UMWA 1974 Pension Trust v. Duquesne Light Co.*, C.A. No. 92-1339 (D.D.C.); *UMWA 1974 Pension Trust v. Canterbury Coal Co.*, C.A. No. 92-1856 (D.D.C.); *UMWA 1974 Pension Trust v. Big Star Coal Co.*, C.A. No. 93-0031-A (W.D. Va.). In the one case respondents have filed in the Western District of Virginia, they have moved to have that case transferred to the District of Columbia for pre-trial proceedings. If that motion is successful, the important industry-wide issues at stake here will be decided by the same court that affirmed the grant of summary judgment to respondents. Respondents have also written to numerous companies informing them that, based on the decisions below, respondents intend to enforce continuing and potentially perpetual obligations to contribute to the trusts. (Reprinted at App. 80a-81a) The letters threaten litigation should the companies fail to comply with respondents' demand.

[6] *See* Brief of the BCOA as *amicus curiae* in Support of Appellees at 2 ("BCOA member companies have a strong economic interest in this litigation"). The withdrawal liability provisions of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ensure the financial health of pension plans. The Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Ch. 99, §§ 9701 *et seq.*, 106 Stat. 3037-3056 (1992) ("the Rockefeller legislation"), guarantees the health benefits of retirees and their families and directs that the members of the BCOA receive potentially all of the proceeds of the evergreen litigation. § 9704(i)(1)(D)(ii)-(iii), 106 Stat. 3045; § 9708, 106 Stat. 3051.

States, decide to place upon them through their control of the BCOA's negotiation of these matters.[7]

This case is but the first of what are already many (*see, e.g., supra* n.5), and will be many more, cases coming to this Court involving the question whether the 1978 NBCWA imposed perpetual contribution obligations on the smaller companies in the coal industry. Because the courts below improperly resolved the issue on a summary judgment basis, and because petitioners are now aware of evidence (enough of which was introduced below to bar the grant of summary judgment) which makes the result below clearly erroneous, this decision will unfairly saddle petitioners with enormous liabilities.

The decisions below are important not only because of their impact on the coal industry, but also because of their impact on the law. Specifically, the decision of the D.C. Circuit affirming the district court's decision presents three questions of substantial importance, each of which merits review by this Court.

First, the D.C. Circuit construed an important national labor agreement in a manner that deprives petitioners of their right to select their bargaining representative to negotiate benefits issues—potentially in perpetuity. In doing so, the D.C. Circuit adopted an unduly narrow definition of waiver of the right to bargain that threatens the collective bargaining rights of employers and employees alike. This case affords this Court the opportunity to decide whether the clear statement rule governing waiver of employee bargaining rights, *see Metropolitan Edison*, 460 U.S. at 705-706, applies to waivers of *employer* bargaining rights, as well as the opportunity to clarify what is necessary to prove such a waiver. *See* pp. 14-19, *infra*.

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[7] These dominant coal companies have already exercised their control of the BCOA negotiation process to shift the financial burdens for funding the Trusts onto their smaller competitors by altering the contribution formula in their own self interest. For example, in the 1988 NBCWA the BCOA negotiated a change in the method for determining the amount of contributions from a per ton of coal produced to a per hour of mining basis. Declaration of Joseph C. Farrell at ¶ 6 (JA 870). This change favors the larger, more capital-intensive coal companies that dominate the BCOA. *Id.*

Second, it has been several years since, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court spoke extensively about the principles governing summary judgment. Since that time, the Court's admonitions that summary judgment is not appropriate where a court must weigh substantial conflicting evidence and that a court must draw material inferences in favor of the non-moving party, have been substantially ignored in a number of circuits. In effect, some courts are treating summary judgment motions as mini-trials and requiring litigants to produce all of their evidence in opposition to the motion, even where discovery has not been completed and there has been no opportunity for cross-examination of the affiants relied upon by the movant. *See* pp. 19-22, *infra*. This case presents the Court with the opportunity to clarify and reaffirm that summary judgment is *not* appropriate where a court must weigh substantial conflicting evidence—particularly where an important federal policy requires that the moving party demonstrate a "clear and unmistakable" waiver by the party opposing summary judgment.

Third, the D.C. Circuit refused to apply the doctrine of judicial estoppel, even though respondents had succeeded in earlier actions in collecting substantial amounts of money, based on an interpretation of the collective bargaining agreement that was directly contrary to the one asserted by them in this action. A split exists among the circuits as to whether to recognize the doctrine of judicial estoppel and, if so, how to define the contours of the doctrine. *See* pp. 23-27, *infra*. This case presents the Court with an opportunity to resolve this conflict.

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DECIDE AN IMPORTANT LABOR LAW ISSUE RELATING TO AN EMPLOYER'S WAIVER OF ITS RIGHT TO SELECT A BARGAINING REPRESENTATIVE.

This case presents the Court with the opportunity to decide an important labor law issue: whether an employer's right to select its own bargaining representative may be waived without the showing of a "clear and unmistakable" intent to waive that

right as this Court has required in a related case governing waiver of employee bargaining rights, *see Metropolitan Edison*, 460 U.S. at 705-706.

In *Metropolitan Edison*, the Court considered the question of waiver of bargaining rights with respect to employees, and held that "a union . . . may not surrender rights that impair the employees' choice of their bargaining representative". *Id. (citing NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974)). In addition, the Court held that an employee may waive his statutorily-protected bargaining rights only where his intent to do so is "clear and unmistakable". *Metropolitan Edison*, 460 U.S. at 708. *Metropolitan Edison* is applicable to this case because of the dramatic impact of the decisions below on both employers' and employees' rights to select their bargaining representative—a right guaranteed by statute. The Third Circuit has held that the "clear and unmistakable" waiver standard enunciated in *Metropolitan Edison* is applicable to a purported waiver by an employer of statutory bargaining rights under federal labor law. *NLRB v. Pennsylvania Tel. Guild*, 799 F.2d 84, 90 (3d Cir. 1986).[8]

Moreover, under respondents' construction, *employees* of companies subject to evergreen liability are potentially perpetually locked into the UMWA Trusts because their employers are obligated to make contributions to those Trusts on behalf of the employees whether or not those employees acting through the UMWA—or some other representative—wish to negotiate a different arrangement and whether or not employees wish to be represented by the UMWA at all. That result is contrary to Section 151 of the National Labor Relations Act (29 U.S.C. § 151), which provides that employees must be free to select their bargaining representative. Cf. 29 U.S.C. § 158(b).

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[8] *See also United Brotherhood of Carpenters and Joiners, Local 2848 v. NLRB*, 891 F.2d 1160, 1164 (5th Cir. 1990) (language of *Metropolitan Edison* specifically addressed the waiver of *any* "statutory right under federal labor law"); *Northern Pacific Sealcoating, Inc.*, 309 N.L.R.B. No. 118 (1992) (applying clear and unmistakable standard to waiver of employer's rights); *Michigan Bell Telephone Co.*, 306 N.L.R.B. No. 54 (1992) (same).

This Court has not yet determined whether the principles of *Metropolitan Edison* apply to the waiver of an employer's rights. If the holding of *Metropolitan Edison* is applicable to employers, it precludes the waiver of an employer's right to choose its bargaining representative. Alternatively, if such a waiver is permissible, it must be established by the "clear and unmistakable" standard.

In the courts below, petitioners argued that respondents' interpretation of the so-called evergreen clause amounted to a waiver of petitioners' right to conduct their own bargaining over health and pension benefits, and that, under the principles of this Court's decision in *Metropolitan Edison*, applied to employers, respondents must establish that petitioners' waiver was "clear and unmistakable".

The district court agreed that respondents' interpretation of the evergreen clause amounted to a waiver of petitioners' right to bargain for themselves but apparently found that the waiver was "clear and unmistakable" even though it also held that the contract was "ambiguous" (App. 26a, 38a) and that petitioners' affiants—some of whom negotiated the 1978 NBCWA—were unaware of any continuing obligation under that contract (App. 55a). Reflecting the unsettled nature of this issue, the court of appeals disagreed. It found that respondents' interpretation of the evergreen clause did *not* amount to a waiver by the employer of its right to bargain, but was rather merely "the exercise of a [bargaining] right that extends into the future". (App. 15a-16a)

The court of appeals' decision that the evergreen clause does not amount to a waiver is manifestly wrong. It is based on the misconception that the evergreen clause is nothing more than an agreement to contribute at objectively determined rates into the future.[9] However, as the court acknowledged elsewhere, the

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[9] The court's reliance on *Link Coal*, 970 F.2d at 905, is likewise misplaced. (App. 16a) In *Link Coal* the issue was whether a coal company could modify its obligations to contribute to the Trusts *prior to the expiration of the 1981 NBCWA*, of which it was a signatory. *Link Coal*, 970 F.2d at 903-904. *Link Coal* simply did not address the question of waiver in the context of negotiations *after* the expiration of an NBCWA to which a company was a signatory.

future contributions required of Pittston are whatever contribution rates, if any, are negotiated between the BCOA and the UMWA.[10] (App. 6a) In terms of federal labor policy, there is a fundamental difference between agreeing to contribute at a rate that will be adjusted in the future according to a designated index and agreeing to contribute at rates *negotiated* by a representative from whom one has withdrawn negotiating authority and who now represents only the interests of competitors.[11]

The court of appeals' holding also reflects a division among the Circuits as to whether the "clear and unmistakable" standard applies when the waiver is based on a contractual provision, as it is here.

The D.C. and Seventh Circuits are alone among the circuits in holding that the "clear and unmistakable" waiver doctrine does not apply to the construction of a contractual provision contained in a collective bargaining agreement. Every other circuit

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[10] It is not disputed that the contribution rates—or whether there will be any contributions at all—is a subject of bargaining between the BCOA and the UMWA after the expiration of each NBCWA. As the Fourth Circuit recognized in *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985), under the 1978 NBCWA, "all rights and benefits [under the collective bargaining agreements] were open for negotiation every three years". Even respondents acknowledge that the evergreen clause does not resolve benefits issues for future collective bargaining agreements. For instance, the Declaration of David W. Kempken, a member of the 1978 Benefits Committee, explains: "The obligation to contribute continues only so long as successor NBCWAs are negotiated by BCOA and the UMWA, and require contributions to the Funds". JA 596.

[11] Because of this fundamental difference, this Court's holding in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), is inapposite. In *Amax*, this Court held that it was not a violation of the National Labor Relations Act § 8(b)(1)(B) for a union to strike a company in an effort to force that company to join a multiemployer trust fund. The Court explained that forcing a company to join such a trust did not result in forcing the company to choose a bargaining representative because the *Trustees* are not bargaining representatives. *Id.* at 330-331. In this case, however, because petitioners are being forced to contribute to the Trusts at rates *negotiated by* the BCOA, petitioners are being forced to choose the the BCOA as their bargaining representative. Thus, the holding in *Amax* is simply not applicable to this case.

consistently applies the waiver doctrine. *Compare Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936-937 (7th Cir. 1992) (waiver doctrine inapplicable to construction of collective bargaining agreement) *with Communication Workers, Local 1051 v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981); *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 256 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981); *United Brotherhood of Carpenters Local 2848 v. NLRB*, 891 F.2d 1160, 1163-1164 (5th Cir. 1990); *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 232-233 (6th Cir. 1988); *Hansen v. Guyette*, 814 F.2d 547, 551 (8th Cir. 1987); *American Distrib. Co. v. NLRB*, 715 F.2d 446, 449-450 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993).

The D.C. Circuit's application in this case of the controversial contractual provision "exception" to the waiver doctrine results in a complete evisceration of that doctrine. Allowing the D.C. Circuit's decision to stand is likely to deter employers from participating in multiemployer bargaining. The rules concerning multiemployer plans require companies to decide at the outset of negotiations for each contract whether to negotiate individually or as a group. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410-411 (1982); *Retail Associates Inc.*, 120 N.L.R.B. 388, 395 (1958). Having decided to bargain with the multiemployer association, a company may not change its mind and bargain separately until the negotiations for the next contract. *Id.* Employers have always been free, however, to select a new representative to negotiate the next contract.

As a result of the decisions below, a multiemployer bargaining association is empowered to deprive an employer for the indefinite future of the power to withdraw and negotiate on behalf of itself. Such deprivation is possible even when the employer is unaware of the waiver, thereby trampling upon any notion that there has been a conscious and willing, much less a clear and unmistakable demonstration, of waiver. This result is

contrary to the federal labor law policy and should be corrected by this Court.

II. THE DECISIONS BELOW PRESENT IMPORTANT QUESTIONS ABOUT THE APPLICATION OF FED. R. CIV. P. 56.

Seven years ago, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court gave comprehensive treatment to summary judgment under Fed. R. Civ. P. 56. This Court held in *Anderson* that the "clear-and-convincing standard of proof [required to prove malice] should be taken into account in ruling on summary judgement motions" and that the evidence should be viewed through the prism of the controlling legal standard. *Id.* at 255. The Court emphasized, however, that its holding did *not* authorize "trial on affidavits". *Id.* Instead, the Court affirmed that in deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". *Id.* (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970)).

In this case, both the district court and the court of appeals granted summary judgment on the issue of the construction of the contract, which amounted to a decision that petitioners had waived their right to select the bargaining representative of their choosing. In reaching their decisions, both courts plainly engaged in practices expressly forbidden by this Court in *Anderson*, namely, weighing conflicting evidence, drawing inferences and resolving questions of credibility in favor of the *moving* party. Furthermore, if, as petitioners contend, an employer's waiver of that basic right must be established under the "clear and unmistakable" standard of *Metropolitan Edison*, then this case also presents an opportunity for this Court to clarify how a heightened evidentiary standard should be taken into account in ruling on summary judgment motions.

In rejecting petitioners' federal labor law defense, the D.C. Circuit, in effect, held that waiver of the right to choose a bargaining representative was possible and that it could be effected by contract—by the BCOA on behalf of its members

even without its members' knowledge.[12] On that basis, the issue was essentially one of contractual intent, as was made explicit by the district court. (App. 35a) Both courts, however, drew all the inferences relating to construction of the evergreen clause in favor of the moving parties, respondents.[13]

For example, in adopting respondents' construction of the evergreen clause:

- The district court held that Pittston had a "compelling" course of performance argument (App. 42a) and that "the Trusts' contradictory positions [were] *some evidence* that the evergreen clause was not intended to create [a] continuing obligation". (App. 46a (emphasis added)) However, the court held that "this evidence is greatly outweighed by the other evidence before the Court". (App. 46a)
- The district court credited Trustee Pierce's affidavit—no doubt prepared by respondents' counsel after the commencement of this litigation—and disregarded Mr. Pierce's prior inconsistent statement. (App. 33a)
- On appeal, the D.C. Circuit accepted respondents' affidavits over other evidence of the parties' intent in

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[12] As noted above, the court of appeals erroneously held that petitioners had exercised, rather than waived, their right. But, however one characterizes it, the decisions below amount to a waiver of petitioners' rights to choose their bargaining representative on these issues for as long as the BCOA and the UMWA enter into agreements denominated "NBCWAs." The court's holding amounts to a ruling that a waiver by collective agreement was possible, even absent knowledge of the waiver by members of the bargaining association.

[13] Both courts also ignored the D.C. Circuit's holdings in *America First Investment Corp. v. Goland*, 925 F.2d 1518 (D.C. Cir. 1991), and *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981). In those cases, the D.C. Circuit held that when parties contest the interpretation of a contract, "summary judgment . . . is appropriate only when the relevant provisions are so straightforward that they can be read in but one way", *Davis*, 667 F.2d at 170, or, if the contract is ambiguous, summary judgment is appropriate only when "there is *no* evidence that would support a conflicting interpretation of the agreement". *America First*, 925 F.2d at 1522 (emphasis added).

agreeing to the evergreen clause, including respondents' prior course of performance and inconsistent statements. Rejecting Pittston's claim that respondents' conduct reflected their understanding of the evergreen clause, the court concluded, without any support in the record, that the conduct instead reflected a "rational business decision". (App. 10a)

- The D.C. Circuit also rejected Pittston's claim that the withdrawal liability provision of the 1988 NBCWA indicated that no continuing obligation was intended to be created by the evergreen clause. The Court held that the intent of the 1988 drafters was "immaterial" (App. 9a, n.8) even though it was clearly strong evidence of course of performance by the 1978 parties.

In the face of petitioners' evidence and the obligation of the courts below to draw all reasonable inferences in favor of the non-movants, it is clear that, at the very least, serious material issues of fact were in dispute regarding the construction of the contract at issue, particularly whether petitioners had "clearly and unmistakably waived" their right to withdraw from the BCOA and to decline to join future NBCWAs.

The decisions below are not isolated instances of the lower courts' departures from the standards set down in *Anderson*. Despite this Court's prohibition against weighing evidence on summary judgment, other circuits have affirmed grants of summary judgment, notwithstanding conflicting evidence from which a jury could have returned a verdict in favor of the non-movant. As the Ninth Circuit has recognized, "[n]o longer can it be argued that any disagreement about a material fact or issue precludes the use of summary judgment". *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). *See, e.g., Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (affirming summary judgment of a Sherman Act claim where the district court drew inferences in favor of the movant-defendant on the issue of intent to control prices and rejected expert evidence that indicated the existence

of predatory pricing); *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988) (affirming summary judgment in a public figure libel case, on the basis that plaintiff's evidence of malice was "insufficient" to require a trial).[14]

Correction of the lower courts' improper use of the summary judgment procedure is rendered particularly important here because this case is only the first of many to reach this Court turning on the question whether the 1978 NBCWA imposed potentially perpetual funding obligations (*see, e.g., supra* n.5), and this case involves a question of crucial importance to the entire coal industry.

The methodology employed in this case by the courts below is especially pernicious where, as here, an important federal policy is at stake. Where the right at issue is one that should require satisfaction of the "clear and unmistakable" standard in order to find a waiver of a basic federal right, then summary judgment cannot appropriately be granted where the lower courts expressly engage in weighing evidence and drawing inferences favoring the moving party.

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[14] In contrast to the decisions below, other circuits have recognized that Fed. R. Civ. P. 56 precludes resolving disputed issues of fact by motion and mandates the drawing of inferences in favor of the non-movant. *See, e.g., Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 307-308 (5th Cir. 1990) (reversing summary judgment because conflicting deposition and affidavit created credibility question); *Florom v. Elliot Manufacturing*, 867 F.2d 570 (10th Cir. 1989) (reversing summary judgment on question of successor corporation's liability based upon successor corporation's post-acquisition conduct); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984) (in question concerning company's obligation to pay retirees' health benefits, reversing summary judgment based on course of performance evidence).

III. THE CIRCUITS ARE DIVIDED AS TO WHETHER A LITIGANT MAY BE JUDICIALLY ESTOPPED FROM ASSERTING A POSITION IN ONE LEGAL PROCEEDING THAT IS INCONSISTENT WITH A POSITION IT HAS PREVIOUSLY ASSERTED IN ANOTHER PROCEEDING AND AS TO THE ELEMENTS NECESSARY TO APPLY JUDICIAL ESTOPPEL.

The doctrine of judicial estoppel, adopted in some form by a majority of the courts of appeals, prevents a litigant from asserting a position in a legal proceeding that is inconsistent with a position that the same litigant successfully took in an earlier action. This is precisely what respondents have attempted to do. They will succeed if the opinion of the D.C. Circuit is left standing, having asserted in the evergreen litigation that Pittston, which was not signatory to the 1988 NBCWA, remains obligated to make contributions to the Trusts, after having prevailed in previous cases on the ground that coal companies that did not sign successor NBCWAs had *no* obligations to the Trusts. *See* pp. 6-8, *supra*. The opinion of the D.C. Circuit permits respondents, with the active support of the dominant coal companies in the BCOA, to pick and choose between withdrawal liability and continuing evergreen liability in whatever fashion permits the dominant coal companies to most effectively shift their voluntarily assumed contribution costs to smaller competitors in the industry.

Although this Court has never explicitly adopted the judicial estoppel doctrine, it has intimated that the doctrine is sound. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975); *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him").

The circuits are divided on the issue of judicial estoppel because of the tension between the Federal Rules of Civil Procedure, which encourage pleading in the alternative, and the interests of judicial integrity and economy which counsel against permitting a party who has succeeded in establishing its position before one court to assert a contrary position before a different court. *Compare In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. at 673 (App. 44a) (*quoting Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980)) (judicial estoppel is "'out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately'") *with Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547-1548 (7th Cir. 1990) ("Inconsistent positions in sequential suits not only multiply the number of decisions, undermining principles of finality, but also facilitate double recovery").

The doctrine of judicial estoppel has been explicitly rejected by two circuits—the Tenth, *see United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986), and the District of Columbia, *see UMWA 1974 Pension Trust*, 984 F.2d at 477 (App. 13a). Both circuits have concluded that the value of eliciting truth outweighs the need to protect the integrity of the courts. App. 13a, n.12; *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956). Exactly how the value of truth is served by permitting a party to choose successively among inconsistent positions according to its then current economic self-interest remains unexplained.

While the Second and Eighth Circuits have neither adopted nor rejected the doctrine of judicial estoppel,[15] the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have

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[15] *See United States v. Bedford Assoc.*, 713 F.2d 895, 905 (2d Cir. 1983); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n.6 (8th Cir. 1987).

accepted the doctrine but are divided as to its scope.[16] The First, Fourth, Fifth and Eleventh Circuits apply judicial estoppel whenever a party, acting with bad faith, asserts a contrary position in another litigation, whether or not the prior statement is adopted by the first court. *Patriot Cinemas*, 834 F.2d at 212; *Jones*, 846 F.2d at 234; *Brandon*, 858 F.2d at 268; *Rebhan*, 842 F.2d at 1261. This version of the doctrine is rooted in equity and "'is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings'". *Id.* (*quoting Johnson Service Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 174 (5th Cir. 1973)).

By contrast, the Third and Seventh Circuits apply the doctrine to prevent a party from asserting a position contrary to one which that party successfully advanced in a prior action.[17] *Delgrasso*, 903 F.2d at 241-242; *Kale v. Obuchowski*, 985 F.2d 360 (7th Cir. 1993); *Astor Chauffeured Limousine Co.*, 910 F.2d at 1548. *But cf. Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992) (in which the court declined to judicially estop a party who has acted in good faith). The rationale of these courts is that judicial integrity is threatened only if a party was successful in advancing the earlier position: "The offense is not taking inconsistent positions so much as it is winning twice, on the basis of incompatible positions". *Astor Chauffeured Limousine Co.*, 910 F.2d at 1548. *See also Hartley v. Mentor Corp.*, 869 F.2d 1469, 1474-1475 (Fed. Cir. 1989) (if a litigant loses in the first action and asserts a contrary position in the

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[16] *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987); *Delgrosso v. Spang and Co.*, 903 F.2d 234, 241-242 (3d Cir.), *cert. denied*, 498 U.S. 967 (1990); *Federal Deposit Ins. Corp. v. Jones*, 846 F.2d 221, 234 (4th Cir. 1988); *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); *Reynolds v. Commissioner*, 861 F.2d 469, 472-474 (6th Cir. 1988); *Astor Chauffeured Limousine Co.*, 910 F.2d at 1548 (7th Cir. 1990); *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 716 (9th Cir. 1990); *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1261 (11th Cir. 1988).

[17] The Sixth Circuit requires both success and bad faith. *Reynolds*, 861 F.2d at 472-474. The Ninth Circuit has not decided which version of the doctrine to apply. *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993).

second action, "[t]here could be no possible affront" to the first court by adopting the contrary position).

Both courts below reached the conclusion that even if they were to recognize the doctrine of judicial estoppel, this is not a case in which the rationale behind the rule would be served by its application. But quite to the contrary, this case provides a prototypical example of precisely what the doctrine was designed to prevent. Allowing respondents to prevail in the evergreen litigation will lead to the coexistence of inconsistent precedents under the same contract as to when the obligation to contribute to the Trusts terminates and will permit respondents to pursue whichever of these inconsistent positions best serves their interests at any given time.

Moreover, in rejecting petitioners' defense based on judicial estoppel, both courts below again disposed of compelling evidence establishing the existence of disputed material facts on a motion for summary judgment by drawing all inferences in favor of the movants. Specifically, both courts ignored the fact that respondents had over a ten year period repeatedly and successfully asserted that signatories to the relevant NBCWAs had *no* continuing obligation to contribute to the Trusts if they failed to sign the subsequent NBCWA. That position is directly and flatly contrary to respondents' position in this litigation.

Insofar as manipulation of the courts and judicial process or bad faith was relevant, the district court, despite being "greatly troubled" by respondents' inconsistent conduct, "speculate[d]", without any basis in the record, that their inconsistent positions "may have been the result of a lack of communication between the attorneys filing the complaints and the trustees themselves". (App. 46a) The court of appeals also chose to ignore the strong inference of manipulation or bad faith that is engendered by respondents' contradictory positions and instead inferred, against non-movant petitioners and without any basis in the record, that

respondents may have simply made a "rational business decision".[18] (App. 10a)

The doctrine of judicial estoppel has been inconsistently applied throughout the federal courts, leading to conflicting results. Thus, had respondents initiated this action in the Third or Seventh Circuits, they clearly would have been precluded from asserting that the evergreen clause created a continuing obligation on the basis of their positions in the withdrawal liability cases. Guidance from this Court is necessary to ensure a uniform policy concerning the assertion of inconsistent positions in multiple actions.

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[18] The circuit court ignored the fact that even if respondents were making a rational business decision, that decision was to take a position which was logically inconsistent with the one asserted here. An inference that respondents had engaged in a manipulation of the courts could have easily been drawn from the evidence below. Respondents did not merely maintain a contradictory litigation position *prior* to the commencement of the evergreen litigation. They continued to take that position in withdrawal liability litigation even *after* the commencement of this case. *See, e.g.*, the Trustees' Memorandum in Support of Their Motion for Summary Judgment in *Kelley Coal*, N.D. W. Va. Civ. Action No. 87-0089-C(K)). JA 1038.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

June 7, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 92-7141, 92-7142.

UNITED MINE WORKERS OF AMERICA 1974 PENSION, *et al.*,

v.

PITTSTON COMPANY, *et al.*,

Appellants.

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST

v.

RAWL SALES & PROCESSING CO.,

Appellant.

Argued December 17, 1992.

Decided February 2, 1993.

Before: EDWARDS, BUCKLEY and SENTELLE,

Circuit Judges.

Opinion for the Court filed by Circuit Judge
HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

This appeal presents issues that have been certified by the District Court for interlocutory review pursuant to 28 U.S.C. § 1292(b). The action before us involves a suit brought by the Trustees (the "Trustees") of certain United Mine Workers of America ("UMWA") pension trusts to require pension fund

contributions from several coal companies (the "Coal Companies"). The District Court granted summary judgment in favor of the Trustees on the issue of liability, *see In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. 658 (D.D.C. 1992) (*"In re UMWA"*), and then, on request of the Coal Companies, certified the matter for interlocutory review.

The parties do not dispute and we agree that the case is properly before this court under 28 U.S.C. § 1292(b). Finding no error in the judgment of the trial court, we affirm and remand for further proceedings.

I. INTRODUCTION

The underlying facts, including the history of this litigation, are recited in the opinion of the District Court. *See In re UMWA*, 782 F.Supp. at 660-62. We will not repeat this background, save as necessary to highlight matters of significance for this appeal.

Briefly, this case involves the interpretation of the so-called "evergreen clause"[1] in the pension trust and collective bargaining agreements between the UMWA and the Coal Companies' bargaining representative, the Bituminous Coal Operators' Association ("BCOA"). The evergreen clause was first added to the trust agreements in 1978, and it was incorporated by reference into article XX(d) of the 1978 "National Bituminous Coal Wage Agreement" ("NBCWA"), and in all subsequent collective

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[1] The evergreen clause in the 1981 trust, reprinted in Joint Appendix ("J.A.") at 967, is exemplary and reads in full:

> Any Employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1981.

bargaining agreements between the parties. The clause provided that participating employers (including the appellants) were bound to make continuing contributions to the trusts, and that the amounts of contribution would be as specified in future NBCWAs.

The dispute in this case arose upon the expiration of the NBCWAs to which the appellant Coal Companies were signatories.[2] Instead of entering into successor NBCWAs, the Coal Companies withdrew from the BCOA and negotiated individual labor agreements with the UMWA which included modifications of their contribution obligations to the trusts. The Trustees then brought this suit, contending that the evergreen clause obligates the Coal Companies to continue contributing to the trusts at the levels established in successor NBCWAs.[3]

On cross-motions for summary judgment, the Trustees submitted declarations from witnesses who participated in the 1978 negotiations, along with corroborating documents generated shortly after those negotiations. In response, the Coal Companies argued that it was noteworthy that the Trustees never previously had sought to enforce a claim premised on "perpetual obligations" under the evergreen clause; rather, according to the Coal Companies, the Trustees always had defined claims against other allegedly defaulting employers solely pursuant to "withdrawal

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[2] The defendants that now comprise the Rawl Companies ("Rawl") were signatory to either the 1978 or 1981 NBCWA or "me too" contracts identical thereto. The defendant PCG Companies ("PCG") were signatory to the 1978, 1981 and 1984 NBCWAs. It is undisputed that the NBCWAs to which the Coal Companies agreed have now expired.

[3] The Trustees' "perpetual obligation" interpretation was advanced in a different context in *Connors v. Link Coal Co.*, 970 F.2d 902 (D.C. Cir. 1992). In *Link Coal*, a trust not a party to this action sued several employers who had negotiated a reduced contribution rate during the term of the 1984 NBCWA. The District Court in *Link Coal* rejected the perpetual obligations theory as a matter of law and granted summary judgment to the employers. *Id.* at 903. This Court reversed, holding that "it is clear that the evergreen clause is, at the very least, susceptible to the Trustees' interpretation." *Id.* at 907. Thus, although we held that the Coal Companies' position was not dictated as a matter of law, we did not finally determine the meaning of the evergreen clause.

liability".[4] After considering the language of the relevant trust and collective bargaining agreements, as well as the interpretive evidence before it, the District Court upheld the Trustees' interpretation of the evergreen clause and granted their motion for summary judgment on the question of liability. *In re UMWA*, 782 F.Supp. at 667.

Defendant Rawl moved the District Court to reconsider its decision and defendant PCG moved for amendment of the District Court's order to satisfy the conditions for interlocutory appeal under 28 U.S.C. § 1292(b). In conjunction with its motion, Rawl submitted new evidence to the District Court; this evidence consisted of declarations of persons familiar with the 1978 negotiations who denied that the evergreen clause was understood to create ongoing obligations. In addition, Rawl argued that it had been unfairly denied adequate discovery and that it had several affirmative defenses that should have survived the summary judgment order.

The District Court refused to consider the "new evidence" offered by Rawl, and it denied the motion for reconsideration. *UMWA 1974 Pension Trust v. Pittston Co.*, 793 F.Supp. 339, 344-46 (D.D.C. 1992). In disposing of the issues raised by Rawl, the District Court held that Rawl had not been unfairly denied an opportunity to conduct discovery, because there had been no agreement restricting the use of extrinsic evidence and because Rawl had not asked for leave of the court to conduct discovery after the Trustees' summary judgment motion was filed. *Id.* at 341-42. In addition, the District Court concluded that Rawl had waived any affirmative defenses "by not asserting them in its own motion for summary judgment and, more importantly, by not

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[4] Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381 *et seq.* (1988), the trustees of multiemployer pension funds may collect "withdrawal liability" from employers who withdraw from the fund. Withdrawal liability typically involves a one-time payment that represents the withdrawing employer's proportionate share of the trust's vested liability that is unfunded in order to prevent a later shortfall.

asserting them in its opposition to the Trusts' motion for summary judgment." *Id.* at 344. The District Court did, however, grant an amendment of its order to certify the case for interlocutory appeal. *Id.* at 348.

II. The Construction of the Evergreen Clause

The Coal Companies claim that the District Court erred as a matter of law in construing the evergreen clause. We disagree. The District Court, relying on the words of the agreements and the extrinsic evidence properly before it, concluded that the only reasonable interpretation of the evergreen clause is one premised on a principle of "perpetual obligation." Accordingly, the District Court granted summary judgment for the Trustees. We have reviewed this judgment *de novo, Shields v. Eli Lilly & Co.*, 895 F.2d 1463, 1466 (D.C. Cir. 1990), and, pursuant to this review, we agree with the conclusion reached by the District Court.

In cases requiring the court to construe the meaning of a contract, the dispute may be resolved as a matter of law if the contested agreement admits of only one reasonable interpretation. *Link Coal Co.*, 970 F.2d at 904. Moreover, in divining the meaning of contract terms, the court is not limited to the four corners of the agreement: the party moving for summary judgment may submit affidavits and other extrinsic evidence that gives color to the words of the agreement or otherwise reveals the intent of the contracting parties at the time of the agreement. *See* Fed. R. Civ. P. 56(e); *see also Link Coal*, 970 F.2d at 904-905 (extrinsic evidence considered to determine the meaning of the evergreen clause). If the moving party demonstrates that no material factual issue remains, the burden then shifts to the non-moving party to produce specific evidence that sufficiently contradicts or undermines the movant's case to demonstrate a material factual dispute. *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1561 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 387, 112 L.Ed.2d 397 (1990). In order to carry this burden and avoid summary judgment, the evidence submitted by the non-moving party must show that more than one *reasonable*

interpretation exists. *Farmland Indus., Inc. v. Grain Bd. of Iraq*, 904 F.2d 732, 736 (D.C. Cir. 1990).

Applying this analytical framework to the contract provisions at hand, we conclude that the District Court was fully justified in granting summary judgment in favor of the Trustees. The language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure sign [sic] that NBCWA. The evergreen clause in the trust documents clearly does not include a durational limitation to the employer's duty to contribute to the trusts. *See* note 1, *supra*. Although the clause does allow for modifications in "successor agreements," the structure of the clause and the reference to the current NBCWA, through the use of "thereto," indicate that only a subsequent NBCWA can qualify as such a successor agreement. Furthermore, section XX(d)[5] of the NBCWAs, which incorporates the evergreen clause by reference, comprehends only the termination of the particular NBCWA and the contribution rates specified therein; it does not, contrary to the Coal Companies' protestations, provide for the general termination of the *duty to contribute* to the trusts. Thus, by accepting the terms of section XX(d), these employers agreed to be bound by the evergreen clause to make continuing contributions to the trusts; and this obligation included an agreement to make contributions at rates specified in subsequent NBCWAs, without regard to

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[5] Section XX(d) of the 1981 NBCWA, reprinted in J.A. at 971, is typical and contains the following language:

> During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below . . . .
>
> . . . .
>
> (i) Into the 1950 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 95.0 per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, $1.11 per ton on each such ton; and for the period beginning June 7, 1983, and ending when this agreement is terminated, $1.11 per ton on each such ton . . . .

whether the employer was still a party to the subsequent agreements. The Coal Companies cannot now rely on their refusal to sign successor NBCWAs to release them from a previously agreed-upon perpetual obligation.[6]

This plain construction of the evergreen clause is corroborated by voluminous extrinsic evidence submitted by the Trustees. First, the Trustees submitted the sworn declarations of five people who were directly involved in the negotiations that led to the inclusion of the evergreen clause in the 1978 trust documents.[7] In addition, the Trustees submitted copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation, *see, e.g.*, BCOA Proposals (Jan. 23, 1978), *reprinted in* J.A. at 689 (protection for BCOA against withdrawals from trusts), and various BCOA and UMWA documents prepared shortly after the negotiations were concluded, *see, e.g.*, Memorandum of B.M. Shaner, Manager of Employee Benefits for Bethlehem Steel Corporation, to John O'Connell, Vice President for Labor Relations, Bethlehem Steel Corporation (May 23, 1978), *reprinted*

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[6] We have no reason to question the propriety of an employer agreeing to be bound to contractual duties beyond the life of a specific collective bargaining agreement. *See Litton Fin. Printing Div. v. NLRB*, ___ U.S. ___, ___, 111 S.Ct. 2215, 2226, 115 L.Ed.2d 177 (1991) (disputes regarding benefits that are to continue after collective bargaining agreement's expiration are deemed to arise under the agreement); *see also United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988) (employer contracted to provide insurance benefits beyond expiration of collective bargaining agreement), *cert. denied*, 489 U.S. 1096, 109 S.Ct. 1568, 103 L.Ed.2d 935 (1989).

[7] *See* Declaration of Donald E. Pierce, Jr., Consultant to the UMWA members of the Benefits Subcommittee of the 1978 negotiations (Feb. 27, 1991), *reprinted in* J.A. at 563; Declaration of B.M. Shaner, Benefits Subcommittee member during the 1978 negotiations (Mar. 4, 1991), *reprinted in* J.A. at 587; Declaration of David W. Kempken, Benefits Subcommittee member during the 1978 negotiations (Mar. 5, 1991), *reprinted in* J.A. at 596; Declaration of K.L. Young, Benefits Subcommittee member during the 1978 negotiations (Mar. 5, 1991), *reprinted in* J.A. at 619; Declaration of Roger M. Haynes, Chairman of the Benefits Subcommittee for the 1978 negotiations (Mar. 7, 1991), *reprinted in* J.A. at 639.

in J.A. at 594-95 (evergreen clause structured to prevent withdrawals from the funds). Finally, the District Court was provided with public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation. *See, e.g., Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor*, 96th Cong., 1st Sess. 418 (1979) (statement of Donald Pierce, economist, UMWA). Thus, not only is the language of the evergreen clause clear in its effect of permanently binding signatory employers to the contribution rates established in current NBCWAs, but it appears that negotiators on *both* sides of the bargaining table at the 1978 negotiations understood the import of that language.

Confronted with this well supported motion for summary judgment, the Coal Companies were able to respond only with a counter-intuitive reading of the pertinent language and references to the Trustees' failure to previously enforce the perpetual obligations explicit in the contract provisions. The Coal Companies' first argument—that section XX(d) of the NBCWAs provides for the termination of the contribution obligation at the expiration of the agreement—is directly at odds with the language of that section. Section XX(d) plainly does not purport to define the durational limits of the contribution requirement, but instead details the amounts due to be paid during specified periods by employers already bound to contribute. *See* note 5, *supra*. Similarly unconvincing is the Coal Companies' argument that the evergreen clause allows for the modification of contribution requirements in non-NBCWA labor agreements. As mentioned above, the phrase allowing for modifications in successor agreements clearly refers to the prior NBCWA, leading us to the natural inference that the only "successor" agreement to an NBCWA is another NBCWA. Hence, we are not persuaded that

the plain language of the relevant provisions accommodates the Coal Companies' interpretation.[8]

Moreover, the Coal Companies provided no extrinsic evidence to substantiate the reasonableness of their interpretation. While the case was being considered on summary judgment, the Coal Companies relied almost exclusively on the Trustees' supposed inconsistent conduct in an attempt to demonstrate that the Trustees have only recently invented the perpetual obligations interpretation of the evergreen clause. This conduct was comprised primarily of the Trustees' use of withdrawal liability rather than suits under the evergreen clause in several earlier instances in which signatory employers failed to contribute to the funds at the rates specified in the NBCWA. *See, e.g., Connors v. Peles*, 724 F.Supp. 1538 (W.D.Pa. 1989); *Connors v. B&W Coal Co.*, 646 F.Supp. 164 (D.D.C. 1986). However, in the cases cited to us, it appears that the companies upon whom the Trustees sought to impose withdrawal liability all were having financial problems.[9] Thus, it is hardly surprising that the Trustees invoked the withdrawal liability rules to garner one-time payments rather than rely upon the evergreen clause to secure a continuing contribution obligation from entities that were seen heading

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[8] The Coal Companies also make a contextual argument based on changes made to the 1988 NBCWA, *reprinted in* J.A. at 998, that provide for withdrawal liability in the event that an employer ceases to be obligated to contribute to the trusts. This argument, too, is flawed. First, the language in the 1988 NBCWA creating withdrawal liability only applies if the employer is not otherwise obligated to contribute to the funds (*e.g.*, no new NBCWA is enacted); it does not imply that the drafters of the 1988 agreement understood that employers have the right to terminate their obligations. More fundamentally, the understanding of the drafters of the 1988 NBCWA is immaterial for the purpose of divining the intent of the drafters of the 1978 NBCWA.

[9] For instance, in *Peles*, the Trustees filed suit against Pelbro Fuel in 1983 for withdrawal liability, *Combs v. Pelbro Fuel, Inc.*, No. 88-1524 (D.D.C. May 27, 1983), and the company was out of business by 1985, *Peles*, 724 F.Supp. at 1542. Likewise, in *B & W Coal Co.*, the court found that the company had withdrawn from the funds in March of 1981, *B & W Coal Co.*, 646 F.Supp. at 167, only four months prior to the company's ultimate failure in July, *see* Joint Brief for Appellants at 11.

toward demise. Indeed, since the legal basis for withdrawal liability does not turn upon the contractual provisions at issue in this case, the Trustees have never taken a contrary position on the meaning of the evergreen clause itself.[10] We will not infer that the Trustees previously had a different interpretation of the clause simply because they made a rational business decision to sue under an alternative theory when certain employers failed to pay into the funds.

In sum, the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial. The Coal Companies responded with an untenable reading of the contractual language and general evidence that the Trustees' interpretation of the evergreen clause is of recent origins. This evidence falls far short of what is necessary to undermine or contradict the Trustees' evidence. *See, e.g., Bias*, 905 F.2d at 1561 (general evidence that decedent was not the type of person to use cocaine insufficient to contradict specific testimony of persons who had used drugs with decedent). Thus, we affirm the District Court's award of summary judgment to the Trustees.

III. RAWL'S MOTION FOR RECONSIDERATION

For many of the same reasons already mentioned, we find no basis upon which to reverse the District Court's refusal to reconsider its decision in light of the alleged "new evidence" belatedly produced by Rawl. Under the Federal Rules of Civil Procedure, a District Court may reconsider its final judgments based on newly discovered evidence if that evidence was unavailable at the time of the judgment. *See* Fed. R. Civ. P. 60(b)(2) (due diligence required); *see also Stoller v. Marsh*, 682 F.2d 971, 981 (D.C. Cir. 1982) (newly discovered evidence submitted with a 60(b) motion only considered if it was

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[10] Since the evergreen clause was not litigated in the withdrawal liability cases, it appears that no court has ever concluded that the evergreen clause does not require continuing contributions by signatory employers.

unavailable before summary judgment), *cert. denied*, 460 U.S. 1037, 103 S.Ct. 1427, 75 L.Ed.2d 787 (1983). Moreover, the decision to grant or deny a rule 60(b) motion is committed to the discretion of the District Court and, unless the decision is "rooted in an error of law," should only be reversed if it constitutes an abuse of discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988).

Here, it is undisputed that most, if not at all, of the information that Rawl belatedly sought to submit with its motion for reconsideration was available before the District Court ruled on summary judgment. Rawl maintains, however, that the parties agreed in an earlier phase of the litigation[11] to forego discovery because the court could decide the case without considering extrinsic evidence, and that the court had entered an order reflecting that agreement. Upon reviewing both the order staying discovery and the transcript of the scheduling conference that led to that order, we find no indication that the court precluded the consideration of extrinsic evidence in ruling on the summary judgment motions. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90-0890 (S.D.W.Va. Jan. 24, 1991) (order suspending time frame order pending decision on summary

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[11] The Trustees originally sued Rawl in the United States District Court for the Southern District of West Virginia. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90-0890 (S.D.W.Va. filed Sept. 19, 1990). In that suit, the parties filed cross-motions for summary judgment. The District Court, with the agreement of the parties, entered an order staying discovery pending disposition of the summary judgment motions, unless the parties agreed to conduct discovery or unless the court granted permission to conduct discovery for good cause shown. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90-0890 (S.D.W.Va. Jan. 24, 1991) (order suspending time frame order pending decision on summary judgment). Prior to ruling on the motions for summary judgment, the case was transferred by the Judicial Panel on Multidistrict Litigation to the District of Columbia where it was consolidated with the PCG cases. *See In re UMWA Employee Benefit Plans Litigation*, No. 886 (J.P.M.L. Dec. 12, 1991) (transfer order). In this District, Rawl filed a motion for oral argument on its pending motion for summary judgment, but did not move for additional discovery. *See* Memorandum in Support of Rawl's Motion for Oral Argument (Jan. 2, 1992), *reprinted in* J.A. at 302.

judgment); *UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90-0890 (S.D.W.Va. Jan. 14, 1991) (transcript of scheduling conference). Indeed, Rawl's putative reliance on such an agreement is belied by its own submissions of extrinsic evidence in support of its cross-motion for summary judgment. Thus, it does not appear that Rawl was in any way misled about the scope of the District Court's inquiry in disposing of this case on summary judgment.

Furthermore, Rawl has failed to demonstrate that it was prejudiced by the supposed lack of discovery. Rawl rested its motion for reconsideration primarily on affidavits from individuals involved in the 1978 negotiations who averred that they were not aware of the continuing obligation aspect of the evergreen clause at that time. *See, e.g.*, Affidavit of E. Morgan Massey, Director of the BCOA in 1978 (Feb. 13, 1992), *reprinted in* J.A. at 838. In addition, Rawl submitted a document created by the Trustees which allegedly evidenced the Trustees' policy of pursuing withdrawal liability rather than continuing contributions under the evergreen clause. *See* Minutes of the 281st Meeting of the UMWA Board of Trustees (Aug. 26, 1981), *reprinted in* J.A. at 1069. Rawl frankly admits that it could have obtained most of this material prior to the District Court's summary judgment ruling. *See* Rawl Brief at 14. Thus, Rawl's objection to the lack of discovery rings hollow.

In any event, even if we were to consider the material belatedly offered by Rawl, we would still conclude that the District Court did not abuse its discretion by refusing to reconsider its judgment. A party opposing summary judgment, when faced with specific evidence that demonstrates the absence of a material factual dispute, cannot defeat the motion simply by offering general denials. *See Bias*, 905 F.2d at 1561. Here, none of the affidavits or declarations submitted in conjunction with the motion for reconsideration were of persons who negotiated or drafted the evergreen clause. Rawl's evidence merely abjured the Trustees' allegations—it did not contradict the first-hand accounts of the evergreen clause negotiations offered by the Trustees. Therefore, it was not an abuse of discretion for the District Court

to conclude that Rawl's new information failed to demonstrate the existence of a material factual dispute.

IV. SUBSIDIARY ISSUES

We briefly address the remaining claims by the Coal Companies only to reaffirm the law of this Circuit.

A. *Judicial Estoppel*

The Coal Companies maintain that judicial estoppel should bar the Trustees from asserting their present interpretation of the evergreen clause because of the tension between it and their litigating position in the withdrawal liability cases. However, we have not previously embraced the doctrine of judicial estoppel in this circuit[12] and we decline to do so in this case. In the circuits that recognize the doctrine, judicial estoppel is used to preclude a party from taking a position that is inconsistent with one successfully asserted by the same party in a prior proceeding. *See, e.g., Astor Chauffeured Limousine Co. v. Runnfeldt Invest. Corp.*, 910 F.2d 1540, 1547-48 (7th Cir. 1990); *see also American Methyl Corp. v. EPA*, 749 F.2d 826, 833 n. 44 (D.C. Cir. 1984) (where recognized, judicial estoppel limited "to cases in which a party prevails on a claim in one court and proceeds in a calculated manner to manipulate a second court by asserting facts at odds with those advanced before the first court"). Since the present case involves wholly distinct issues and facts from those of the withdrawal liability cases, the Trustees have not been required to contradict earlier sworn statements or present conflicting interpretations of the evergreen clause to successive tribunals. Furthermore, there is no indication that the Trustees have deliberately set out to manipulate the system or to unfairly

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[12] *See Konstantinidis v. Chen*, 626 F.2d 933, 936-38 (D.C. Cir. 1980). In *Konstantinidis*, we explained that judicial estoppel is designed to preserve the integrity of the judicial system and the sanctity of sworn statements. *Id.* at 937. However, far from endorsing judicial estoppel as the most appropriate means of effectuating that policy, we expressed a preference for the "determination of cases on the basis of the true facts as they might be established ultimately." *Id.* at 938.

burden the Coal Companies with compound judgments. *Cf. Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992) (judicial estoppel prevents a party from using inconsistent positions to win two judgments arising from the same claim). In this case the Trustees have simply asserted alternative grounds for recovery against different litigants based on different sets of facts. Hence, even if we were to recognize judicial estoppel in this circuit, this case does not present a scenario that would lead us to seriously consider its application.

B. *Issue Preclusion*

The Coal Companies also argue that the Trustees' claims are barred by issue preclusion resulting from the disposition of the withdrawal liability cases. Issue preclusion prohibits a party from relitigating an issue in a subsequent proceeding if the issue was actually litigated in an earlier proceeding and determined by a court of competent jurisdiction, and if the preclusion would not be unfair to the precluded party. *See Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992). In the present suit, the prerequisites for issue preclusion are clearly not satisfied by the Trustees' litigation of the withdrawal liability cases. As we noted above, the issue in the withdrawal liability cases was not the same as that in this case. Consequently, the meaning of the evergreen clause has never before been litigated to a final conclusion and, hence, there is no basis to hold the issue precluded in the present case.

C. *Rawl's Waiver of Defenses*

Rawl next complains of the District Court's holding that Rawl waived several affirmative defenses by not raising them in opposition to the Trustees' motion for summary judgment. *See UMWA 1974 Pension Trust v. Pittston Co.*, 793 F.Supp. 339, 344 (D.D.C. 1992). First, Rawl argues that it should not be deemed to have waived a defense based upon the statute of limitations since it had no opportunity to raise this argument after the case was transferred to this District Court and prior to the summary judgment ruling. However, as noted above, Rawl did file a motion prior to the summary judgment order. Since disposition on

summary judgment would resolve the case as a matter of law, Rawl naturally should have briefed dispositive legal defenses like the running of the limitations period. Instead, Rawl merely asserted that it had certain defenses, one of which was based on the statute of limitations, that were not applicable to the other defendants. *See* Memorandum in Support of Rawl's Motion for Oral Argument, *reprinted in* J.A. at 306. In support of its motion, Rawl explained that, "these additional defenses are laid out in detail in Rawl's briefs . . . that were filed in the United States District Court for the Southern District of West Virginia in 1991." *Id.* Yet, because the running of the limitations period was plainly not an issue under West Virginia law, the briefs filed in that court make no mention of the defense. Thus, the failure to brief the limitations defense before summary judgment in this District was the result of Rawls' [sic] omission, not lack of opportunity.

In addition, Rawl argues that it did not raise other affirmative defenses at the summary judgment stage because those defenses required discovery to develop. As a general rule, though, the failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense. *See, e.g., Attorney General of United States v. Irish People, Inc.*, 595 F.Supp. 114, 120 n. 9 (D.D.C. 1984) (affirmative defenses abandoned when not raised at summary judgment stage), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986); *Pantry Inc. v. Stop-N-Go Foods, Inc.*, 796 F.Supp. 1164, 1167-68 (S.D. Ind. 1992) ("[t]his Court knows of no authority for holding that affirmative defenses are somehow latent and survive a partial summary judgment to be argued at trial—even though the complete issue of liability has been determined."). Thus, we affirm the District Court's holding that Rawl abandoned its affirmative defenses by not raising them prior to summary judgment.

D. *Waiver of Bargaining Rights*

Finally, the Coal Companies argue that the Trustees' interpretation of the evergreen clause cannot have the effect of precluding employers from renegotiating contribution rates because, under *Metropolitan Edison Co. v. NLRB*. 460 U.S. 693,

708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983), bargaining rights are only subject to "clear and unmistakable" waiver. This argument is specious and we reject it as such.

As we explained in detail in *Link Coal*, the "waiver" argument misses the distinction between the waiver of a right and the exercise of a right that extends into the future. 970 F.2d at 905. "[T]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining." *Id.* Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When the Coal Companies signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against the Coal Companies. There is no issue of waiver in this case.

V. CONCLUSION

For the reasons set out above, we hold that the District Court properly granted the Trustees' motion for summary judgment on the issue of liability. The judgment of the District Court is therefore affirmed and the case is remanded.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Multidistrict Litigation No. 886.
Civ. A. Nos. 88-969, 88-3716, 89-2833 and 91-3241.
Misc. No. 91-386.

In re UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*, *Plaintiffs*,

v.

The PITTSTON COMPANY, *et al.*, *Defendants*.

UNITED MINE WORKERS OF AMERICA 1950
BENEFIT PLAN AND TRUST, *et al.*, *Plaintiffs*,

v.

PITTSBURG & MIDWAY COAL MINING CO., *Defendant*.

John Allen PIERCE, *et al.*, *Plaintiffs*,

v.

UNITED MINE WORKERS OF AMERICA 1950
BENEFIT PLAN AND TRUST, *et al.*, *Defendants*.

UNITED MINE WORKERS OF AMERICA 1974
PENSION TRUST, *et al.*, *Plaintiffs*,

v.

RAWL SALES & PROCESSING CO., *Defendant*.

Jan. 31, 1992.
As Amended Feb. 3, 1992.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Before the Court are cross-motions for summary judgment in Civil Action Nos. 88-969 (*Pittston*), 88-3716 (*Pittsburg & Midway* (P & M)), 89-2833 (*Pierce*), and Civil Action No. 91-3241 (*Rawl*).[1] The three cases brought by the United Mine Workers of America (UMWA) Pension and Benefit Trusts (the *Pittston*, *P & M*, and *Rawl* cases) are actions to collect delinquent contributions and are brought pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* (ERISA) and § 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a) (LMRA).[2] The

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[1] On December 18, 1991, the Judicial Panel on Multidistrict Litigation transferred the *Rawl* case from the Southern District of West Virginia to this Court because it involves questions of fact and law in common with the cases currently pending here. The cases were given Multidistrict Litigation Number 886. At the time of the transfer, cross motions for summary judgment in the *Rawl* case had been fully briefed and argued before Judge Robert J. Staker of the Southern District of West Virginia. After the transfer, the defendants in the *Rawl* case moved this Court to permit additional oral argument on its pending summary judgment motion. The Court has carefully reviewed the briefs and the transcript of the hearing before Judge Staker and does not find any need for additional oral argument. Because the issues and arguments in the *Rawl* case are sufficiently similar to those in the cases already pending before this Court, the Court hereby consolidates the *Pittston*, *P & M*, *Pierce*, and *Rawl* cases for the purpose of this Memorandum Opinion.

[2] The cases brought by the Trusts are styled as actions for a declaratory judgment that defendants Pittston, P & M, and Rawl are obligated to make contributions required under the National Bituminous Coal Wage Agreement of 1988 (NBCWA). ERISA provides that a participant, beneficiary, or fiduciary of a plan covered by the Act may bring a civil action:

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; 29 U.S.C. § 1132(a)(3). The trustees bring the actions in their fiduciary capacities.

case brought by the UMWA and some of its individual members (the *Pierce* case) is an action for declaratory and injunctive relief to prevent the Trusts from interfering with the collective bargaining agreement entered into between the UMWA and Pittsburg & Midway Coal Mining Co. in 1988 (the 1988 UMWA/P & M Agreement). It is also brought pursuant to ERISA and LMRA. Similarly, in the *Pittston* case, Pittston has filed a counterclaim seeking a declaratory judgment that the collective bargaining agreement, entered into between the UMWA and all of the Pittston Coal Group Companies (collectively referred to as PCG) in 1990 (the 1990 UMWA/PCG Agreement) is a valid and enforceable agreement. Rawl has filed a similar counterclaim with respect to the collective bargaining agreements entered into between the UMWA and Sprouse Creek Processing Company, Inc., Rocky Hollow Coal Company, Inc., Big Bottom Coal Company, Inc., Tall Timber Coal Company, and P.M. Charles Coal Company (collectively referred to as the Rawl Companies) in 1984 (the 1984 UMWA/Rawl Agreements).[3] Having considered the cross motions and supporting memoranda and exhibits, the Court shall grant summary judgment for the Trusts in all four cases for the reasons that follow.

I. BACKGROUND: THE EVERGREEN CLAUSE

Although the causes of action in the four cases at issue are technically distinct, each involves the interpretation of the "evergreen clause" or "continuing contributions clause," which is found in the language of the UMWA 1950 Benefit Plan and Trust (the 1950 Benefit Trust), the UMWA 1950 Pension Trust (the 1950 Pension Trust), the UMWA 1974 Pension Trust (the

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LMRA provides that suits for violations of contracts between an employer and a labor organization may be brought in any district court of the United States. 29 U.S.C. § 185(a).

[3] Sprouse Creek Processing Company, Inc., Rocky Hollow Coal Company, Inc., Big Bottom Coal Company, Inc., Tall Timber Coal Company, and P.M. Charles Coal Company were merged into Rawl Sales and Processing Company on November 3, 1989.

1974 Pension Trust), and the 1974 Benefit Plan and Trust (the 1974 Benefit Trust).[4] The terms of these Trusts were negotiated by the Bituminous Coal Operators' Association (BCOA) and the UMWA in 1978. According to the Trusts and the BCOA, who is acting as *amicus curiae* in these cases, the evergreen clause was intended to provide for the long-term financing of pensions and health benefits for elderly miners who retired from the coal industry.[5] Thus, allegedly to ensure that the obligation to contribute would apply equally to all participating employers, the BCOA and the UMWA placed the evergreen clause into the trust documents, which are incorporated by reference into the collective bargaining agreements of every employer that elects to participate in the Trusts, including employers who are not members of the BCOA.

The language of the evergreen clause is the same in each Trust except that the name of the Trust is different in each one. For example, the evergreen clause as first written in the 1950 Benefit Trust provides:

> Any employer who employed any Participant eligible for coverage under, or who receives or received benefits under, the 1950 Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984.

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[4] The *P & M* and *Pierce* cases involve only the 1950 Trusts, while the *Pittston* case involves both 1974 Trusts and the 1950 Benefit Trust. The *Rawl* case involves all four Trusts.

[5] The 1950 Trusts provide pensions and benefits for miners who retired prior to 1976, while the 1974 Trusts provide pensions and benefits to those who retired in 1976 or thereafter.

1950 Benefit Trust, Article XII (emphasis added). The most recent national Bituminous Coal Wage Agreement (NBCWA) was entered into in 1988 and specifies the amounts to be contributed by employers participating in the 1950 and 1974 Trusts.

The thrust of the Trusts' claim is that the defendant employers obligated themselves to the continuing contributions required by the NBCWA when they either: (1) became signatories to one of the NBCWAs since 1978, which incorporated the Trusts by reference, or (2) entered into individual collective bargaining agreements with the UMWA that were "me-too" agreements patterned after the NBCWA and also incorporating the Trusts by reference. The *Pittston* and *Rawl* cases are an example of the former, while the *P & M* case is an example of the latter.[6]

In *Pittston*, the 1950 and 1974 Trusts were incorporated into the 1984 NBCWA, to which the PCG companies were signatories.[7] Article XX of this agreement covers health and retirement benefits and provides that:

> The United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund have heretofore been amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.
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> The United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust

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[6] P & M denies that its 1984 collective bargaining agreement with the UMWA was a "me-too" agreement. This will be discussed later in this Memorandum Opinion.

[7] At that time, the PCG companies were members of the BCOA. They have since withdrawn from the BCOA and entered into a separate agreement with the UMWA, the 1990 UMWA/PCG Agreement. This Agreement occurred after a lengthy and bitter strike.

> provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

1984 NBCWA, Article XX, Section (b) (emphasis added). Using similar language, the 1984 NBCWA incorporated the 1974 Trusts in Article XX, Section (c). Like the PCG Companies, the *Rawl* companies were signatories to an NBCWA that incorporated the 1950 and 1974 Trusts by reference. The last NBCWA that they were signatories to, however, was the 1981 NBCWA, which expired in 1984.[8] It contained language identical to that in Article XX of the 1984 NBCWA.

In the *P & M* case, P & M, as a non-BCOA company, entered into a separate agreement with the UMWA known as the North River Energy Company Coal Wage Agreement of 1984 (1984 North River Agreement). That agreement contained language identical to the language quoted above from the 1984 NBCWA. It too incorporated the 1950 and 1974 Trusts and provided that the terms and conditions of those Trusts were as set forth in the Trusts themselves. *See* 1984 North River Agreement, Article XX, Sections (b) and (c).

The thrust of the defendant employers' arguments is that federal labor law and policy does not permit interference with the rights of employers and unions to negotiate collective bargaining agreements. Additionally, they argue that the Trusts are collaterally or judicially estopped from attempting to enforce the evergreen clause based on: (1) a recent district court decision in two related cases in this district and (2) the Trusts' apparent inconsistent position with respect to cases in which it has sought withdrawal liability from employers who are not contributing to the Trusts.

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[8] After the 1981 NBCWA expired, the Rawl Companies engaged in a lengthy and acrimonious labor dispute, which finally resulted in the execution of new collective bargaining agreements with the UMWA in 1988.

II. DISCUSSION: ARGUMENTS AND ANALYSIS

The issues raised in the cross motions for summary judgment fall into three basic categories: (1) the proper interpretation of the language of the Trusts and the collective bargaining agreements, (2) the applicability of federal labor policy, and (3) the applicability of collateral or judicial estoppel.

A. *Language Interpretation*

1. Plain Language

The defendant employers argue that the 1984 collective bargaining agreements (in the *Pittston* and *P & M* cases) and the 1981 agreement (in the *Rawl* case) specifically limited their obligations to contribute to the Trusts to the duration of those collective bargaining agreements. The 1981 and 1984 NBCWAs and the 1984 North River Agreement provided in a number of places that contributions were to be made "during the life of this Agreement." For instance, in the section covering contributions by employers, the agreements provided that "[d]uring the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below. . . ." 1981 NBCWA, Article XX, Section (d); 1984 NBCWA, Article XX, Section (d); 1984 North River Agreement, Article XX, Section (d). Later, in what is known as the "guarantee clause," the agreements added more qualifying language:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.*
>
> In order to fully fund these guaranteed benefits, the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other

> benefit plans described in Section (c) of this Article XX during the term of this Agreement. *These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.*

1981 NBCWA, Article XX, Section (h); 1984 NBCWA, Article XX, Section (h); 1984 North River Agreement, Article XX, Section (h). Pittston, P & M, and Rawl now argue that by the express terms of the 1981 and 1984 agreements, once those agreements expired, the defendants' obligations to contribute to the Trusts also expired. In fact, as the defendants point out, the subsequent agreements entered into between the employers and the UMWA (the 1990 UMWA/PCG Agreement, the 1988 UMWA/P & M Agreement, and the 1988 UMWA/Rawl Agreements) specifically provide for the termination of the defendants' obligations to contribute to the 1950 Trusts. A Memorandum of Understanding between the PCG companies and the UMWA, which is incorporated into the 1990 UMWA/PCG Agreement, provides that:

> . . . the PCG Companies shall be deemed to have withdrawn from the UMWA 1950 Pension Plan and Trust and the UMWA 1950 Benefit Plan and Trust ("the 1950 Plans") at 12:00 a.m. February 1, 1988. The PCG Companies shall not participate in the 1950 Plans nor shall they be bound by or subject to any term or provision of the documents which govern the existence or administration of the 1950 plans.

Memorandum of Understanding Concerning Participation in the United Mine Workers of America Health and Retirement Funds, ¶ 1 (February 21, 1990) (UMWA/PCG MOU).[9] The 1988

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[9] This Memorandum of Understanding also contained a so-called "poison pill," which provided that as long as the Trusts approved the 1990 Agreement, the PCG companies would continue to contribute to the 1974 Trusts, but at a lower rate than that required by the 1988 NBCWA. Because the Trusts did not approve the Agreement, Pittston argues that the PCG companies have no further obligation to contribute to the 1974 Trusts.

UMWA/P&M Agreement similarly provided for a termination of P & M's contribution obligations:

> As of 11:59 p.m., January 31, 1988 (the "termination date"), the Employer shall totally and perma-nently [sic] cease to have any obligation to make contributions to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") or to the United Mine Workers of America 1950 Benefit Trust ("1950 Benefit Trust") (collectively the "1950 Trusts").

1988 UMWA/P & M Agreement, Article XX, Section (b).[10] Not surprisingly, the 1988 UMWA/Rawl Agreements followed suit, including a provision stating that "[t]his Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference. . . ." 1988 UMWA/Rawl Agreements, Article XXIV, Section (b).

The Trusts argue that all of the limiting language contained in the 1981 and 1984 NBCWAs and the 1984 North River Agreement referred only to the *rates of contribution* to the Trusts rather than to the *obligation* to continue contributing to the Trusts. In other words, the Trusts argue that the provision providing that "during the life of this Agreement" each signatory employer must contribute certain specified amounts, means that those specified rates of contribution apply only during the life of the collective bargaining agreement. Upon the expiration of the agreement, the obligation does not cease, but the rates of contribution may change in accordance with the rates set out in the successor NBCWA. The same argument can be made with respect to the language of the guarantee clause contained in the 1981 and 1984 NBCWAs and the 1984 North River Agreement, quoted above.

In addition to their arguments based on the limiting language of the 1984 Agreements, the defendants have another argument based on the language of the evergreen clause itself. They argue

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[10] The 1988 UMWA/P & M Agreement also contained a poison pill similar to that contained in the UMWA/PCG MOU.

that their 1988 and 1990 individual collective bargaining agreements with the UMWA are "successor agreements" within the meaning of the evergreen clause. The Court finds this argument unpersuasive.

The evergreen clause provides that employers who choose to participate in the Trusts become obligated to comply with the terms and conditions of the Trusts, "including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements *thereto*, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984." (Emphasis added.) Notwithstanding defendants' arguments to the contrary, it is clear to the Court from the language of the evergreen clause that the word "thereto" specifically refers to the National Bituminous Coal Wage Agreement of 1978. The only successor agreements to that agreement are the National Bituminous Coal Wage Agreements of 1984, 1988, and subsequent years.

Although the Court finds no ambiguity in the meaning of "successor agreements thereto," the Court is less certain about the proper interpretation of the remaining language of the evergreen clause and the 1981 and 1984 collective bargaining agreements. Because this language is "'reasonably susceptible of different constructions or interpretations,'" *Lee v. Flintkote Co.*., 593 F.2d 1275, 1282 (D.C.Cir. 1979) (citation omitted), the Court will consider extrinsic evidence to determine the intent of the contracting parties.[11] This circuit made this exception to the parol evidence rule clear with respect to collective bargaining agreements, stating that:

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[11] In the *Pittston*, *P & M*, and *Pierce* cases, which have been pending in this Court for some time, the parties have had at least two years to conduct discovery. In the *Rawl* case, which was recently transferred here from the Southern District of West Virginia, the parties have not yet conducted discovery. Nevertheless, much of the extrinsic evidence produced in the *Pittston*, *P & M*, and *Pierce* cases is relevant to the *Rawl* case. Thus, the Court will consider this evidence for the purpose of deciding all four summary judgment motions, and will not permit further discovery by any party to any case at this time.

> when interpreting collective bargaining agreements, extrinsic evidence of the meaning of disputed clauses such as past practice, related agreements, and bargaining history are quite properly considered to determine the parties' intentions, especially where the Agreement is ambiguous.

United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators' Ass'n, 898 F.2d 177, 180-81 (D.C.Cir. 1990).[12]

2. Extrinsic Evidence

Before the Court can consider extrinsic evidence, it must determine what extrinsic evidence is relevant to this case. P & M argues that only the intent of P & M and the UMWA when they negotiated the 1984 North River Agreement is relevant. The Trusts, however, argue that the intent of the BCOA and the UMWA in negotiating the terms of the Trusts and the 1984 NBCWA are irrelevant because the 1984 North River Agreement was merely a "me-too" agreement.[13] This Circuit has held that the intent relevant to interpreting a me-too contract "is that of the leader . . . , not that of the follower." *Bituminous Coal Operators'*

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[12] Defendants argue that *Connors v. Barrick Gold Exploration, Inc.*, 745 F.Supp. 747 (D.D.C. 1990)(Revercomb, J.), *aff'd*, 946 F.2d 1564 (D.C.Cir. 1991), prohibits reliance on extrinsic evidence. This is too broad a reading of that case, in which the court noted that it should consider only the provisions of a collective bargaining agreement, and not extrinsic evidence, if the provisions "are clear and unambiguous on their face." *Id.* at 747. Because the Court has already determined that the provisions of the evergreen clause and the 1984 collective bargaining agreements are not "clear and unambiguous," the Court may properly rely on extrinsic evidence.

[13] Pittston does not make an argument over the relevant evidence beyond arguing that no extrinsic evidence should be considered. Presumably this is because the PCG companies were signatories to the 1984 NBCWA, thus the intent of the BCOA and the UMWA is necessarily the relevant intent.

Rawl also does not make a separate argument about the scope of extrinsic evidence to be considered.

Ass'n, Inc. v. Connors, 867 F.2d 625, 635 (D.C.Cir. 1989).[14] Accordingly, the Court will look to evidence of the intent of the BCOA and the UMWA when negotiating the Trusts and the 1984 NBCWA.[15]

The Trusts' evidence of the intent of the evergreen clause is voluminous and persuasive. The Trusts have submitted the declarations of five people who took part in the negotiations between the BCOA and the UMWA in 1978, four of which are former BCOA negotiators and one of which is a former UMWA

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[14] P & M argues that its 1984 North River Agreement was not a me-too agreement. This argument is unpersuasive because in P & M's own motion for summary judgment, it admits that

> In the 1984 North River Agreement, the company adopted most of the terms stated in the collective bargaining agreement between the UMWA and the Bituminous Coal Operators Association ("BCOA"), called the 1984 National Bituminous Coal Wage Agreement ("1984 NBCWA").

P & M Memorandum in Support of Motion for Summary Judgment (P & M Summary Judgment Memorandum) at 4. The only terms that differed from the NBCWA regarded regular vacation periods, Christmas/New Year's shutdown, no reimbursement for advanced health premiums, frequency of paydays, bereavement pay, and protective gloves. *Id.* at n. 1. These differences do not appear to be significant enough to take the 1984 North River Agreement out of the realm of me-too contracts.

[15] Even if the Court wanted to consider evidence of the intent of P & M and the UMWA in negotiating the 1984 North River Agreement, P & M has supplied the Court with *no* such evidence. P & M instead argues that the language of the North River Agreement is clear and the Court should interpret it by looking at the entire agreement. Pittston argues that if the Court considers the Trusts' extrinsic evidence, then it must permit Pittston to conduct discovery in order to respond. Pittston argues that rule 56(f) should be applied liberally to permit such discovery. Pittston has had two years to conduct discovery, knowing that the Court would likely consider extrinsic evidence. Discovery thus far has been voluminous to say the least. The Court will not now reward Pittston's decision to squander its time by granting it another lengthy period of discovery.

With respect to Rawl, which also seeks discovery if the Court considers extrinsic evidence, this Court finds that the evidence already submitted in connection with the other pending cases and with the *Rawl* case is sufficient for this Court to make a determination about the meaning of the evergreen clause.

negotiator (who is now a trustee). Allegedly, it was as a result of these negotiations that the evergreen clause was added to the 1950 and 1974 Trusts. The declarations establish that the evergreen clause was written to ensure that all employers participating in the Trusts would share equally in the burden of amortizing the existing Trust deficits and in funding future benefits. In 1978, when the language was negotiated, the 1950 Funds had about $6 billion in unfunded liabilities. The BCOA was allegedly concerned that without an obligation to continue contributing to the Trusts, some employers would try to terminate or reduce their contributions, thus leaving other employers to carry more than their share of the Trusts' liabilities. Roger M. Haynes, who was the chairman of the BCOA subcommittee on benefits for the 1978 negotiations (as well as for the 1971, 1974, 1981, and 1984 negotiations), states in his declaration as follows:

> The evergreen clause was not a "technical" provision to assist the Funds in collecting delinquent contributions, and was not discussed in those terms. It was an important provision negotiated to make sure that any coal operator that voluntarily agreed to participate in the Funds in 1978 could not simply walk away from the Funds and leave its retirees behind, or negotiate cut-rate contributions with the UMWA, at the expense of the remaining employers . . . .
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> • • • • •
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> These provisions were placed in the trust documents so that we could be sure that the trust documents would apply to any non-BCOA employer that wanted to participate in the Funds, even if that employer was not signatory to the NBCWA. In other words, an employer did not have to be a BCOA member or even signatory to a wrap-around contract to participate in the Funds. Non-BCOA employers were free to negotiate with the UMWA any terms and conditions of employment that they could negotiate. But once an employer agreed with the UMWA to participate in the Funds by using the Funds to provide benefits to its employees and retirees, that employer had to participate on the same terms as all other participating employers. Each employer had to contribute to the Funds at

> the same rate, and each would receive the same level of benefits for its employees and retirees. By insisting on these contractual preconditions for participation in the Funds in 1978 and thereafter, the Funds' settlors, BCOA and the UMWA, agreed that the Funds should not become a "last man's club" where certain employers could pull out entirely, or contribute at reduced rates, at the expense of the remaining employers.

Second Declaration of Roger M. Haynes at ¶¶ 19 and 21 (Second Haynes Declaration). Mr. Haynes' statements are illustrative of the declarations of the other former BCOA negotiators. Each recounts the negotiation of the evergreen clause as an attempt to ensure that the Trusts would not become a "last man's club." Additionally, transcribed notes and minutes of the 1977-78 negotiations support the declarations and the Trusts' position that the BCOA was concerned about preventing employers from pulling out of the Trusts and leaving the remaining employers to foot the bill for retirees of those employers who had pulled out or had gone out of the coal-mining business.[16] During the 1979 congressional hearings on the Multiemployer Pension Plan Amendments Act of 1980 (which amended ERISA), Donald Pierce, who had participated in the 1978 negotiations on behalf of the UMWA, testified as follows:

> We think it is imperative that existing, participating employers in multiemployer plans be kept in the fold. In the last negotiations, the Mine Workers and the operators added the following parallel language to each of the plans in trust, and that language, which I shall not quote [the evergreen clause language], essentially obligated all present employers who were contributing to the multiemployer plans, to continue contributing into the future based on contributions called for in successor agreements to the National Bituminous

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[16] Indeed, this appears to be what may have occurred. For instance, according to the Trusts' unrebutted allegations, there are over 2,000 retirees of PCG companies still receiving benefits from the Trusts.

> Coal Wage Agreement, whether or not that particular employer remained signatory to the Wage Agreement.
>
> By attempting to insure that as many employers as possible remained, the union, of course, was helping to guarantee that an ever-increasing liability would not be added to employers who might remain, had other employers abandoned the plan.

Declaration of Donald E. Pierce, Jr. (Pierce Declaration), Exhibit A. Without detailing the numerous other examples provided as exhibits to the Trusts' cross motions, suffice to say that the Trusts have made an extremely persuasive showing regarding the intent of the evergreen clause.

The defendant employers, on the other hand, have submitted virtually *no* evidence to rebut the Trusts' showing of intent.[17] Instead, they rely on the argument that the Court need not consider extrinsic evidence or, in the alternative, that the intent of the BCOA and the UMWA is irrelevant. Additionally, they argue that the Trusts made up their current theory in 1986 (Rawl argues it was not created until 1988), after employers began entering into collective bargaining agreements that did not conform to the obligations allegedly required by the evergreen clause. To support this argument, P & M and Rawl point to a November 1986 decision of the Board of Trustees of the UMWA Health and Retirement Funds, in which the Board ruled that, with respect to "nonconforming" agreements:

> (a) While the Union and an employer are obviously free in their collective bargaining to choose whatever plan of benefits coverage they may agree upon, if they agree that the employer is to contribute to any of the Plans established

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[17] There is no reason that the defendant employers should not have been able to find evidence of contrary negotiating history, if any was there to find. The UMWA has been actively involved in these cases from the very beginning, as *amicus curiae* in the *Pittston* and *Rawl* cases and as the plaintiff in the *Pierce* case. The UMWA was a negotiating party when the evergreen clause was agreed to in 1978. Certainly if the UMWA had evidence that the clause was not intended to create a continuing obligation, it would have introduced such evidence in these cases.

> under the National Bituminous Coal Wage Agreement, then the employer must contribute to such Plan on the basis of the contribution rate established under that Agreement, and on no other rate.
>
> (b) Appropriate remedial measures shall be taken by the Funds to ensure that participation in the National Agreement Plans is in accordance with the foregoing standard.

407th Meeting of the Board of Trustees of the United Mine Workers of America Health and Retirement Funds, November 24, 1986, at 3. Nothing that has been proffered to the Court suggests that the Board's decision was anything other than a policy statement about how to respond to nonconforming agreements in light of the history and intent of the evergreen clause. There is no evidence that this decision was the creation of some novel new theory upon which the Trusts could subsequently base their litigation.

The *only* statement that defendants have pointed to that arguably supports their position is an alleged statement by Donald Pierce, made at a Trustees' meeting in 1988. The statement was made during a discussion of a motion, proposed by Pierce, to accept participation in the Trusts by a certain employer on terms that apparently did not conform to the terms in the NBCWA.[18] The motion was opposed by other trustees, who recounted the history of the evergreen clause at length. The meeting minutes then indicate the following:

> Trustee Pierce noted that the companies here had not signed the 1984 Wage Agreement, and that the Trustees have not taken the position that the UMWA and an employer cannot alter the employer's obligation under the "evergreen" provisions of the Plan documents. That situation is not present in the *Pittston*, *A & E* and related litigation, and such a conclusion may be unsupportable as a matter of labor law.

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[18] The proposal under consideration had been made by A. T. Massey Coal Company, the parent company of Rawl.

426th Meeting of the Board of Trustees of the United Mine Workers of America Health and Retirement Funds, June 7, 1988, at 4. The Trusts explain Pierce's first statement as an argument that with respect to new signatories, any level of contribution was better than no contribution at all. This argument was rejected by the other trustees. Pierce's second statement, referring to the *Pittston* litigation, was also rejected by the other trustees who now seek to enforce the evergreen clause.

The Court confesses to a great deal of confusion over the import of Pierce's statement. Certainly, to the extent that Pierce was advocating a position contrary to that now taken by the Trusts, it is clear that the position was rejected by the other trustees and as such should not have any effect on the merits of the cases now before the Court. Whether Pierce's statement is any indication of his recollection of the intent of the evergreen clause is, however, a more difficult question. The Court is nevertheless persuaded by Pierce's subsequent declaration that the evergreen clause was intended to prevent participating employers from withdrawing from the Trusts and leaving the liabilities to the remaining employers. This declaration is consistent with all of the other evidence of intent produced by the Trusts and is consistent with Pierce's own testimony at congressional hearings held in 1979.

Having reviewed the voluminous evidence of the negotiating history of the evergreen clause, the Court is convinced that the clause was intended to ensure that all participating employers would contribute equally to the Trusts and would not be permitted to withdraw from participation and leave the burden for funding the pensions and health benefits of retired miners to the remaining participating employers. By so holding that this is the proper interpretation of the evergreen clause, two issues remain: (1) is the obligation created by the evergreen clause permissible under federal labor law; and (2) are the Trusts collaterally or judicially estopped from taking their current position with respect to the evergreen clause?

B. *Federal Labor Policy*

Although the parties argue strenuously over federal labor policy, all are in agreement about most of the fundamental precepts. All agree that collective bargaining obligations are determined by contract and that parties to collective bargaining are free to negotiate the terms of their agreement. P & M even agrees that parties can create obligations that survive the expiration of a collective bargaining agreement. The basis for such a continuing obligation "must necessarily find its genesis in the collective bargaining agreement." *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-83 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S. Ct. 1002, 79 L. Ed. 2d 234 (1984). *See also Nolde Bros. Inc. v. Local No. 358, Bakery & Conf. Workers Union*, 430 U.S. 243, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977). Having agreed to this much, P & M asserts that only when the collective bargaining agreement clearly expresses the parties' intent to create a long-term obligation will a court enforce such an obligation. It then argues that the 1984 North River Agreement does not clearly express such an intent and, in fact, expresses an opposite intent by virtue of the limiting language discussed at length above.

The argument made by Pittston and Rawl, though stated in different terms, is basically the same. As a premise, they, like P & M, argue that the PCG companies and the Rawl companies have a statutory right to bargain with the UMWA over pension and benefits issues. This right has never been disputed. Pittston and Rawl then admit that they may waive their statutory rights, but argue that a court will not find a waiver unless it is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 & n.12, 103 S. Ct. 1467, 1477 & n.12, 75 L. Ed. 2d 387 (1983); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114-15 (D.C. Cir. 1986). Next, just as P & M argued that its 1984 North River Agreement did not clearly express the intent to create a continuing obligation, Rawl and Pittston argue that neither the 1981 or the 1984 NBCWA constituted a "clear and unmistakable" waiver of their right to renegotiate contributions to the Trusts in the future.

Having made these arguments, the defendants seek this Court's declaration that the subsequent collective bargaining agreements entered into between the employers and the UMWA (the 1988 UMWA/P & M Agreement, the 1988 UMWA/Rawl Agreement, and the 1990 UMWA/PCG Agreement), are valid and enforceable and may not be collaterally attacked by the Trusts. Defendants' arguments, however, merely beg the question of how to interpret the evergreen clause. The 1988 and 1990 agreements can only be valid if the Court determines the evergreen clause does not create a continuing obligation. As the Court has already held, the negotiating history of the evergreen clause evidences a clear intent to create a continuing obligation.[19] Thus, the Court cannot issue the declaration that the defendants request unless it determines that the evergreen clause is invalid or unenforceable for other reasons.

Defendants pose only one other argument to attack the validity of the evergreen clause. They argue that the clause as interpreted by the Trusts creates an indefinite or perpetual

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[19] In its briefs, P & M cites several cases in which courts have purported to rule that the obligations of an employer pursuant to a collective bargaining agreement expire with the termination of the collective bargaining agreement. As a general proposition, this is indisputably true. However, as the parties have already agreed, an obligation may extend beyond the termination of the collective bargaining agreement if that intent is clearly expressed in terms of negotiating history of the agreement. In the cases cited by P & M, none of which involved the interpretation of the evergreen clause, the courts looked at the negotiating history and determined that there was no intent for the obligations at issue to extend beyond the expiration of the agreement. These cases have no real relevance to the cases now before the Court because they involved entirely separate obligations with entirely separate negotiating histories. These cases include: *District 29, United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985) (determining that employer's obligation to provide certain benefits directly to retirees expired with termination of collective bargaining agreement); *District 17, United Mine Workers of America v. Allied Corp.*, 765 F.2d 412 (4th Cir.) (*en banc*) (implying the same) *cert. denied*, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985); *United Mine Workers of America International Union v. Nobel*, 720 F. Supp. 1169 (W.D. Penn. 1989) (same), *aff'd*, 902 F.2d 1558 (3d Cir.1990), *cert. denied*, — U.S. —, 111 S. Ct. 1102, 113 L. Ed. 2d 212 (1991); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986) (same).

obligation that is unenforceable by the courts. It is true that "[l]abor contracts of indeterminate duration or ones that do not provide a manner of termination are terminable at will." *Montgomery Mailers' Union 127 v. Advertiser Co.*, 827 F.2d 709, 715 (11th Cir. 1987) (citing *Communications Workers of America v. Southwestern Bell Telephone Co.*, 713 F.2d 1118, 1123 n.4 (5th Cir. 1983); *Boeing Airplane Co. v. N.L.R.B.*, 174 F.2d 988, 991 (D.C. Cir. 1949)). Thus, the defendants argue that they were free to terminate their obligation to contribute to the Trusts when their 1981 and 1984 collective bargaining agreements with the UMWA expired in 1984 and 1988, respectively.

The Trusts make several rebuttal arguments. First, they note that the issue in this case involves a single provision of a contract, not an entire labor contract. P & M has already agreed that a provision of a contract may survive the termination of the contract as long as such an intent is clearly expressed in the contract. Secondly, the Trusts argue that the evergreen clause is not indefinite or perpetual. Rather, the obligation to contribute continues only as long as the BCOA and the UMWA set new contribution rates in the NBCWA. Because the obligation is thus terminable upon the occurrence of a specific event, *i.e.*, the BCOA and the UMWA agreeing not to set new contribution rates, the Trusts argue that it is not terminable at the will of the defendant employers and the Union. *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir. 1985); *Payroll Express Corp. v. Aetna Casualty & Surety Co.*, 659 F.2d 285, 291-92 (2d Cir. 1981). Moreover, the Trusts note that it is common for courts to enforce contractual obligations to finance the pensions and benefits of retired employees even after the expiration of the contract providing for such benefits. *See, e.g., United Steelworkers of America v. Connors Steel*, 855 F.2d 1499, 1504-05 (11th Cir. 1988) (when contract provided that pensioners "shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the company . . .," court held that employer's obligation to provide benefits continued after the expiration of the negotiated labor contract); *International Union, United Automobile, Aerospace and*

Agricultural Implement Workers of America and Its Local 784 v. Cadillac Malleable Iron Co., Inc., 728 F.2d 807, 808-09 (6th Cir. 1984) (even when contract did not expressly state that retirees' benefits shall not be terminated or reduced, court held that it was intention of the parties that retirement benefits be made payable for the life of the retired employees, even after the expiration of the contract).

Finally, the Trusts argue that the basic proposition that contracts of indefinite duration are terminable at will is a rule of contract interpretation that can be overcome by evidence of contrary intent. The Trusts cite *Hodge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C. Cir. 1983), in which this circuit, in the employment contract context, wrote that "[t]hough the classic assumption of the law is that the parties intend a contract of indefinite term to be terminable at will, basic principles of contract law inform us that the parties can contract otherwise. The controlling factor is the intent of the parties with respect to the terms of the contract . . . ." *Id.* at 1568. With this rule of law as a background, once again the issue comes back to what the parties intended the evergreen clause to mean.

In support of their interpretation of the evergreen clause, the Trusts argue that national labor policy strongly favors the enforcement of contractual promises to contribute to multiemployer benefits funds. The Trusts cite some of the legislative debate over the Multiemployer Pension Plan Amendments Act of 1980, which added section 515 to ERISA, 29 U.S.C. § 1145. During this debate, Representative Thompson and Senator Williams stated that "[s]ound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

Similarly, the Trusts cite cases such as those already cited in this Opinion, in which courts have held that retirement rights may not be altered merely by negotiating a new agreement, absent the consent of the pensioners. *See Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181-82, 92 S. Ct. 383, 398-99, 30

L. Ed. 2d 341 (1971). They also cite a litany of cases in which courts have noted the danger posed by unions entering into arrangements with particular employers that "might compromise the broader interests of the plan as a whole," *Central States v. Central Transport, Inc.*, 472 U.S. 559, 579, 105 S. Ct. 2833, 2844, 86 L. Ed. 2d 447 (1985), and have reiterated that each union and employer participating in a plan "has an interest in the prompt collection of the proper contribution from each employer." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 373, 104 S. Ct. 1844, 1850, 80 L. Ed. 2d 366 (1984). In short, the Trusts make the argument that goes to the heart of their case: without the Court's enforcement of the evergreen clause, the defendant employers and the UMWA will be permitted to compromise the broader interests of the 1950 and 1974 Trusts and adversely affect other participating employers who continue to make the required contributions.

The Court finds the Trusts' arguments persuasive. Without disputing any of the fundamental labor policies advocated by the defendants, the Court is convinced that the BCOA and the UMWA intended to create a continuing obligation to contribute to the Trusts once an employer makes the decision to participate. There is no evidence that the defendant employers were not aware of this obligation when they made the decision to participate in the Trusts. In light of this, it would run afoul of national labor policy for this Court to dishonor the parties' intentions and invalidate the evergreen clause as an unenforceable provision of indefinite duration. Therefore, the Court holds that the evergreen clause is neither invalid nor unenforceable based on federal labor policy.

C. *Collateral and/or Judicial Estoppel*

The defendants' final and perhaps most persuasive arguments in support of their motions for summary judgment involve collateral estoppel and judicial estoppel.

1. Collateral Estoppel

The doctrine of collateral estoppel, also referred to as issue preclusion, provides that "'once a court has decided an issue of

fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980)). Although mutuality is no longer a requirement of collateral estoppel, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 651, 58 L. Ed. 2d 552 (D.C. 1979), the doctrine does have some strict requirements. First, the issue "must have been actually litigated, that is, contested by the parties and submitted for determination by the court." *Otherson v. Dept. of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983). Second, the issue "must have been 'actually and necessarily determined by a court of competent jurisdiction.'" *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)). Third, preclusion "must not work an unfairness" because "the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Id.* The potential for unfairness is especially acute when a party in the second case was not a party to the first case.

The defendant employers argue that the Trusts are collaterally estopped from litigating the evergreen clause based on two grounds: (1) the recent district court decision in the consolidated cases of *Connors v. Island Creek Corp., et al.*, No. 87-1212, and *Connors v. Drummond Coal Co., et al.*, No. 87-1973 (D.D.C. Jan. 17, 1991) (Harris, J.) (collectively referred to as the *Island Creek* cases); and (2) the Trusts' apparent inconsistent position taken with respect to earlier cases in which they sought withdrawal liability.

a. *The Island Creek Cases*

In the *Island Creek* cases, even the Trusts admit that the evergreen clause and its enforceability were put into issue. The cases were brought by the 1950 Pension Trust to force the defendants, who were signatories to the 1984 NBCWA, to contribute to the Trust at the rate provided in that agreement, $1.11 per ton. Apparently, during the term of the 1984 NBCWA, the 1950 Pension Trust had become fully funded. The defendant

employers and the UMWA then entered into Employment and Economic Security Pacts (EESPs) that reduced the contribution rate from $1.11 per ton to $0.25 per ton. The 1950 Pension Trust argued that the evergreen clause prevented the defendants from negotiating contribution rates that differed from those in NBCWA.

The difficulty in analyzing the preclusive effect of Judge Harris' decision in the *Island Creek* cases is that although he granted summary judgment for the defendants, he issued no written opinion.[20] His brief two-paragraph Order merely states that "[o]n the facts and circumstances presented in these cases, the Court concludes that summary judgment in favor of the defendants is appropriate." *Connors v. Island Creek Corp., et al.*, No. 87-1212 and *Connors v. Drummond Coal Co., et al.*, No. 87-1973 (D.D.C. Jan. 17, 1991). The defendants argue that the validity of the evergreen clause was necessarily determined by this decision and that Judge Harris' holding is implicit: employers who have participated in the 1950 Pension Trust may negotiate separate agreements with the UMWA that modify their obligations in a way that is inconsistent with the NBCWA.

The Trusts have several rebuttals to this argument. First, they argue that although the meaning of the evergreen clause was put in issue in the *Island Creek* cases, it was not "actually determined" by Judge Harris. This is because the defendants in the *Island Creek* cases allegedly relied heavily on the fact that the 1950 Pension Trust was fully funded and the reduced contributions would have no effect on the actuarial soundness of the Trust. The Trusts cite several examples from oral argument in which counsel for the defendants stressed the importance of this fact. At one point counsel noted that this fact "distinguishe[d] this case from all of the other cases." Transcript of Oral Argument in *Island Creek* cases at 7 (Jan. 7, 1991). Counsel and Judge Harris both noted that this factual difference, among others, was the reason that the *Island Creek* cases were not consolidated with the cases now before this Court. Counsel repeatedly

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[20] The *Island Creek* cases are currently on appeal.

reiterated that the EESPs were to take effect "only after full funding had occurred and there could be no actuarial harm to the 1950 Pension Fund." *Id.* at 11. Judge Harris also reiterated the point, asking counsel whether full funding was in fact achieved before the lower contribution rate came into effect. *Id.* Based on these repeated references to the 1950 Pension Trust's full funding status, the Trusts suggest that the only issue actually determined by Judge Harris was that the employers and the UMWA are free to negotiate a reduced contribution rate to a fully funded trust.

The defendants' main rebuttal to this argument is that this circuit has already held that signatories to the 1984 NBCWA or a "me-too" agreement, which, by their terms, required employers to make contributions at a certain level, must continue to make the specified contributions without regard to the funding level of the Trust. *Bituminous Coal Operators' Ass'n v. Connors*, 867 F.2d 625 (D.C. Cir. 1989). Thus, the defendants argue that Judge Harris could not have been relying on the funding level of the 1950 Pension Trust when he granted summary judgment for the defendants in the *Island Creek* cases.

This Court need not speculate about the basis of Judge Harris' decision. This circuit has recently held, in no uncertain terms, that "if the basis of [a prior] decision is unclear, and it is thus uncertain whether the issue was actually and necessarily decided in that litigation, then relitigation of the issue is not precluded" by collateral estoppel. *Connors v. Tanoma Mining Co., Inc., et al.*, 953 F.2d 682, 684 (D.C. Cir. 1992). Because there was no written decision issued in the *Island Creek* cases, the basis for that decision is indisputably unclear. Therefore, this Court cannot hold that the validity of the evergreen clause was "actually and necessarily decided" in those cases and collateral estoppel will not operate to bar the litigation of the issue in the cases now before the Court.

b. *The Withdrawal Liability Cases*

The defendants point to four cases in which the Trusts brought claims for withdrawal liability under ERISA after the defendant coal companies ceased contributing to the Trusts upon the expiration of their collective bargaining agreements. To seek

withdrawal liability under ERISA, an employer must have made a complete or partial withdrawal from a multiemployer pension or benefit plan. 29 U.S.C. § 1381(a). A partial withdrawal occurs when an employer's contributions drop below a certain level. *Id.* at § 1385. A complete withdrawal occurs when the employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." *Id.* at § 1383(a). In the cases referred to by defendants, the defendant employers were signatories to the 1978 NBCWA. When that Agreement expired in 1981, the defendants ceased contributing to the Trust yet continued coal mining operations. The Trusts then brought their claims for withdrawal liability by alleging that when the 1978 NBCWA expired in 1981, the employers ceased having an obligation to the Trusts and thus completely withdrew from the Trusts within the meaning of 29 U.S.C. § 1383(a). This position, the defendants allege, is directly contrary to the position the Trusts take in this case.

The defendants' argument is compelling. In *Combs v. Pelbro Fuel, Inc.*, No. 83-1524 (D.D.C. filed May 27, 1983), the Trusts' Proposed Findings of Fact and Conclusions of Law stated the following:

> Pelbro "permanently cease[d] to have an obligation to contribute" to the Plans, as meant by Section 4203(a)(1) of ERISA, on March 27, 1981, when the 1978 Wage Agreement expired. Pelbro obviously ceased to have an obligation to contribute under a "collective bargaining (or related) agreement" on that date, as meant by Section 4212(1) of ERISA, 29 U.S.C. § 1392(1). Further, because the 1978 Wage Agreement in terms limited a signatory employer's obligation to contribute to "the life of this Agreement" and for "periods of time . . . ending when this Agreement is terminated," Pelbro also ceased to have an obligation to contribute under "applicable labor-management relations law" on that date, as meant by Section 4212(2) of ERISA.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law, No. 83-1524 at ¶ 4 (July 1984). The Trusts took a similar position in *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986)

and in *Connors v. Van Mulvehill*, 679 F. Supp. 1071 (N.D. Ala. 1988). Additionally, in *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1772-73 (1986), the Trusts argued in an arbitration proceeding that an employer had withdrawn from the Trusts when its collective bargaining agreement expired rather than at a later date urged by the defendant employer. In each of these cases, the employers discontinued contributing to the Trusts when the 1978 NBCWA expired in 1981. Thus, these cases represent an earlier group of cases than those now before the Court, which involve employers who ceased contributing after their 1981 and 1984 collective bargaining agreements expired.

The Trusts argue that the evergreen clause was not actually litigated and determined in any of these cases, therefore collateral estoppel does not apply. This is indisputably true with respect to the *Pelbro*, *B & W Coal*, and *Van Mulvehill* cases, in which the Trusts alleged in their complaints that the defendant employers had ceased having an obligation to contribute to the Trusts. This is also true with respect to the *Garland Coal* case, in which the dispute was over the date of the employer's withdrawal from the Trusts. In none of these cases was the evergreen clause ever discussed or disputed. It simply was not mentioned. Accordingly, none of the elements of collateral estoppel have been met. Under this circuit's recent decision in *Tanoma Mining*, this Court holds that the Trusts are not collaterally estopped from litigating the evergreen clause based upon the allegedly contrary position taken in four earlier withdrawal liability cases.

2. Judical Estoppel

Judicial estoppel "'precludes a party from taking a position inconsistent with one previously taken with respect to the same fact in an earlier litigation.'" *Donovan v. United States Postal Service*, 530 F. Supp. 894, 902 (D.D.C. 1981) (quoting *Himel v. Continental Ill. Nat'l Bank*, 596 F.2d 205, 210-11 (7th Cir. 1979)). The object of the doctrine of judicial estoppel "'is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings.'" *Konstantinidis v. Chen*, 626 F.2d 933, 937

(D.C. Cir. 1980) (quoting *Melton v. Anderson*, 32 Tenn. App. 335, 339, 222 S.W.2d 666(1948)). Unlike equitable estoppel, it does not require proof of privity, reliance, or prejudice. *Id.* Instead, it is invoked "to prevent a party from playing 'fast and loose with the courts.'" *Id.* (quoting *Scarano v. Central Railroad*, 203 F.2d 510, 513 (3d Cir. 1953)). Without ever expressly rejecting the doctrine, this circuit has expressed its wariness of judicial estoppel, agreeing with the Tenth Circuit that its utilization "'would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.'" *Id.* at 938 (quoting *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956)). *See also American Methyl Corp. v. E.P.A.*, 749 F.2d 826, 833 n. 44 (D.C. Cir. 1984).

Assuming that the doctrine is still viable in this circuit, the criteria for its application were spelled out in *Donovan*: "(1) the same facts must be in issue . . ., (2) the judicial body must have 'been led astray,' . . . and (3) the assertions must not have been based on fraud, inadvertence, or mistake . . . ." 530 F. Supp. at 902 (citing *Konstantinidis*, 626 F.2d at 937 & 939). Stated a bit differently, this circuit has held that the doctrine applies only to "cases in which a party prevails on a claim in one court and proceeds in a calculated manner to manipulate a second court by asserting facts at odds with those advanced before the first court." *American Methyl*, 749 F.2d at 833 n.44.

The Trusts argue that the same facts are not in issue in the present cases as were in issue in the withdrawal liability cases because the evergreen clause was not at issue in those cases. Additionally, they argue that they have not deliberately manipulated the judicial process to their advantage. Instead, they point out that the few cases in which they sought withdrawal liability were brought in the early 1980s against relatively small employers. These cases were but a small fraction of the many cases regularly brought by the Trusts for withdrawal liability after coal companies cease operations. Later, as more and more larger employers such as the defendants in these cases began to cease contributing while remaining in business, the trustees engaged in a full analysis of the problem and determined that the evergreen

clause imposed an obligation on employers that survived beyond the termination of their collective bargaining agreements. Ever since, the Trusts have conformed all of their practices to this interpretation and have not sought withdrawal liability in any case in which the evergreen clause is involved.[21] Although there is no doubt an inconsistency in the positions taken by the Trusts over the years, the Court simply does not have before it any evidence of calculated manipulation of the courts or bad faith. For these reasons, as well as the general preference against the doctrine, the Court will not bar this litigation on the basis of judicial estoppel. The Court may, however, consider the Trusts' inconsistent positions as a judicial admission.

3. Judicial Admissions

Although a judicial admission is binding only in the case in which it is made, a court may consider a judicial admission as evidence in another case. *See Universal American Barge Corp. v. J-Chem, Inc., et al.*, 946 F.2d 1131 (5th Cir. 1991); *State Farm Mutual Auto Ins. Co. v. Worthington*, 405 F.2d 683 (8th Cir. 1968). Such evidence may, however, be contradicted by other evidence when presented. *Id.*

In this case, the Court takes notice of the fact that, despite the reams of negotiating history supporting the Trusts' interpretation of the evergreen clause, the Trusts failed to rely on the clause a mere four years after it was negotiated when they moved for withdrawal liability in the *Pelbro*, *B & W Coal*, *Van Mulvehill*, and *Garland Coal* cases. One certainly would have thought that as important as the clause allegedly is, the Trusts would have brought suit to enforce the clause rather than to collect withdrawal liability. Their early decisions to seek withdrawal liability, and in doing so to assert that the noncontributing employers had ceased having an obligation to the Trusts, is in direct conflict with their current position that the expiration of a collective bargaining agreement does not result in the expiration

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[21] The only cases cited by defendants in which withdrawal liability was sought involved the cessation of contributions in 1981 upon the expiration of 1978 collective bargaining agreements.

of the obligation to contribute. The Court is greatly troubled by this apparent change of position.

As the Court has already discussed, the Trusts' basic excuse for this action is mistake or inadvertence. The Trusts' assert that there was never an occasion to consider bringing suit based on the evergreen clause until the large employers such as Pittston and P & M ceased contributing. At that point, the evidence is clear that the Trustees made a policy decision to begin enforcing the evergreen clause. There is no evidence that the trustees ever realized that they had previously brought actions for withdrawal liability when they should have brought them under the evergreen clause. This, the Court can only speculate, may have been the result of a lack of communication between the attorneys filing the complaints and the trustees themselves.

Although the Court considers the Trusts' contradictory positions to be some evidence that the evergreen clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly outweighed by the other evidence before the Court. As has already been detailed, the declarations of five of the negotiators of the evergreen clause establish that the evergreen clause was specifically created to prevent participating employers from withdrawing from the Trusts and leaving the burden of funding retiree benefits to the remaining participating employers. This intent is also clear in the transcripts of testimony before Congress in 1979. Moreover, the Court notes, the interpretation urged by the Trusts makes sense. No employer would want to be left paying for the benefits for retirees of other employers who decided to skip out on their obligations. The evergreen clause, as onerous as it may now appear, was a sensible way to ensure that no single employer or small group of employers would be left holding the bag. To fail to accept the Trusts' interpretation of the evergreen clause would produce just such a result. Ultimately, the remaining employers would be unable to maintain adequate funding and the beneficiaries of the Trusts—the retirees—would be the ones who suffer. The Court is unconvinced that this is the result intended when the evergreen clause was negotiated. The court declines to

bind the Trusts to the assertions made in the pleadings in four relatively minor withdrawal liability cases filed years ago.

III. CONCLUSION

The Court has carefully considered the evidence and arguments of all of the parties to these cases and of the *amicus curiae*. Because the language of the evergreen clause is susceptible to different interpretations, the Court has considered extrinsic evidence of the intent of the clause. This evidence has convinced the Court that, despite the position taken by the Trusts in early litigation, the intent of the clause was to create a continuing obligation to contribute for those employers who elect to participate. Notwithstanding the defendants' arguments to the contrary, the Court is confident that federal labor policy could not condone dishonoring this intent, as expressed in the evergreen clause and its negotiating history. Because the Court has reached these legal conclusions, and because the parties agree that there are no material issues of fact in dispute, the Court shall, by accompanying Order, grant summary judgment in favor of the plaintiff Trusts in Civil Action Nos. 88-969, 88-3716, and 91-3241, and for the defendant Trusts in Civil Action No. 89-2833.

United States Court of Appeals

For The District of Columbia Circuit

No. 92-7141 **September Term, 1992**
CV 88-0969
CV 91-3241

United Mine Worker of America
1974 Pension, et al.,

v.

Pittston Company, et al.,

Appelants

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and Consolidated Case No. 92-7142

BEFORE: Edwards, Buckley and Sentelle, Circuit Judges

O R D E R

Upon consideration of the petitions for rehearing of the Pittston Company (Pittston) and Rawl Sales and Processing Company, and of the March 12, 1993 letter submitted by Pittston, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Filed: March 31, 1993
Ron Garvin
CLERK

United States Court of Appeals
For The District of Columbia Circuit

No. 92-7141 **September Term, 1992**
CV 88-0969
CV 91-3241

United Mine Worker of America
1974 Pension, et al.,

v.

Pittston Company, et al.,

Appelants

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and Consolidated Case No. 92-7142

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsberg, Silberman, Buckley, Williams, D.H. Ginsberg, Sentelle, Henderson rcuit Judges

ORDER

The Suggestions For Rehearing **En Banc** of the Pittston Company (Pittston) and Rawl Sales and Processing Company, and the March 12, 1993 letter submitted by Pittston, have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court, **En Banc** that the suggestions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge did not participate in this matter.

Filed: March 31, 1993
Ron Garvin
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 88-969 and 91-3241.

MDL No. 886.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,

Plaintiffs,

v.

THE PITTSTON COMPANY, *et al.*,

Defendants.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,

Plaintiffs,

v.

RAWL SALES AND PROCESSING CO.,

Defendant.

April 29, 1992.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Before the Court are two related motions: a Motion for Reconsideration of this Court's January 31, 1992 Memorandum Opinion granting summary judgment for the plaintiffs, filed by Rawl Sales and Processing Co. (Rawl);[1] and a Motion for Amendment of this Court's January 31, 1992 Order, filed by the

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[1] This motion is joined by The Pittston Company, *et al.*

Pittston Company *et al.*, (Pittston). For the reasons that follow, this Court shall deny Rawl's motion, grant Pittston's motion in part, and certify the issues raised in the January 31, 1992 Memorandum Opinion, 782 F.Supp. 658, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

BACKGROUND

On January 31, 1992, this Court issued a Memorandum Opinion and Order granting summary judgment for the plaintiffs, the United Mine Workers of America (UMWA) Pension and Benefit Trusts (collectively referred to as the Trusts), in Civil Action Nos. 88-969 (*Pittston*), 91-3241 (*Rawl*) and two other related cases.[2] In that Opinion, the Court held that the "evergreen clause" or "continuing contributions clause" found in the UMWA 1950 Benefit Plan and Trust (the 1950 Benefit Trust), the UMWA 1950 Pension Trust (the 1950 Pension Trust), the UMWA 1974 Pension Trust (the 1974 Pension Trust), and the 1974 Benefit Plan and Trust (the 1974 Benefit Trust), was intended to create a continuing obligation to contribute to the Trusts for those employers who elected to participate in the Trusts.[3] The Court

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[2] The *Rawl* and *Pittston* cases are two of six related cases pending in this Court. Two of the cases *UMWA 1950 Benefit Plan and Trust, et al. v. Pittsburg & Midway Coal Mining Co.*, No. 88-3716, and *Pierce, et al. v. UMWA 1950 Benefit Plan and Trust, et al.* No. 89-2833, entered into a settlement and a stipulation of dismissal after this Court issued its Memorandum Opinion. The other two cases, *UMWA 1974 Pension Trust, et al. v. A & E Coal Co., Inc. et al.*, No. 88-1126, and *UMWA 1974 Pension Trust, et al. v. Aloe Coal Company, et al.*, No. 91-207 are still pending before this Court and were not a part of this Court's January 31, 1992 Memorandum Opinion.

The *Rawl* case was transferred to this Court on December 18, 1991 by the Judicial Panel on Multidistrict Litigation. It had originally been filed in the Southern District of West Virginia and, at the time of the transfer, cross motions for summary judgment had been fully briefed and argued before Judge Robert J. Staker of that district. This Court fully considered the briefs in the *Rawl* case and the transcript of the oral argument before Judge Staker before rendering its January 31, 1992 Memorandum Opinion.

[3] The evergreen clause was negotiated by the Bituminous Coal Operators' Association (BCOA) and the UMWA in 1978 and was added to the Trust

held that this continuing obligation extended beyond the expiration of the terms of the collective bargaining agreements in which the defendant employers had elected to participate in the Trusts. In accordance with this holding, the Court ordered the defendant employers, including Rawl and Pittston, to make all of the delinquent contributions into the Trusts in which they have participated, as required by the National Bituminous Coal Wage Agreement (NBCWA) of 1988.

The Court reached its conclusion based on the voluminous briefs of all of the parties and of the *amicus curiae*, as well as on oral argument. Because the Court held that the language of the evergreen clause was susceptible to different interpretations, the Court considered extrinsic evidence of the intent of the clause.[4] The Court then determined that the unrebutted evidence submitted by the Trusts regarding the negotiating history of the clause showed that the clause was intended to create a continuing obligation. No party argued to the Court that summary judgment was inappropriate due to the existence of genuine issues of material fact.

DISCUSSION

A. *Motion for Reconsideration*

Rawl asserts four separate grounds for its Motion for Reconsideration: (1) its "right" to conduct discovery; (2) the existence of genuine issues of material fact; (3) the existence of affirmative defenses that it needs to explore through discovery; and (4) the collateral estoppel effect of the *Island Creek* cases decided by Judge Harris of this Court and currently on appeal. *See Connors v. Island Creek Corp., et al.*, No. 87-1212, and

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language at that time. It provided that those employers who elected to participate in the Trusts were obligated to make contributions based on the rates set forth in 1978 National Bituminous Coal Wage Agreement, and successor agreements thereto.

[4] At the time the Court issued its Memorandum Opinion, the *Pittston* case had been pending since 1988 and numerous extensions of the discovery deadlines had been sought and granted.

Connors v. Drummond Coal Co., et al., No. 87-1973 (D.D.C. Jan. 17, 1991).

1. Rawl's "Right" to Conduct Discovery

Rawl's most heated argument is premised on its asserted "right" to conduct discovery into the negotiating history of the evergreen clause. Rawl claims that when this case was originally brought by the Trusts in West Virginia, the parties and the Court agreed that, in order to avoid protracted discovery that would interfere with the company's upcoming collective bargaining negotiations, the parties would file cross motions for summary judgment before embarking on any discovery. Rawl asserts that it specifically reserved its "right" to conduct discovery if the Court concluded that it was necessary to resort to extrinsic evidence. The transcript of a telephone status conference with Judge Staker in West Virginia does not indicate that Rawl ever requested a reservation of its right to conduct discovery or that Judge Staker granted such a request. The transcript reveals only that the parties and the Court agreed that discovery would be stayed pending the Court's ruling on cross motions for summary judgment. The Order entered following the telephone status conference provided that:

> The parties have agreed that discovery shall not be initiated in this case pending the Court's decision on the Motions for Summary Judgment, except upon agreement of the parties or order of this Court for good cause shown.

Exhibit A to Declaration of Jeremiah Collins, submitted as Attachment 1 to the Trusts' Opposition to Rawl's Motion for Reconsideration. Although Rawl never moved the Court to permit it to engage in discovery, it did attempt to reserve its right to discovery in a footnote to its reply brief regarding the cross motions for summary judgment.

Because this Court's Memorandum Opinion explicitly relies on extrinsic evidence, Rawl argues that it should have been permitted to engage in discovery before this Court rendered its Opinion. Rawl argues that, if permitted, it would have deposed

the various people who gave declarations on behalf of the Trusts and challenged their credibility.

Despite what Rawl argues that it would do *now*, if given the opportunity, the fact remains that Rawl did not seek leave of the Court to conduct any depositions. Rawl was fully aware that the Court might consider extrinsic evidence because reams of it had been filed and relied upon by the Trusts in not only the *Rawl* case, but also in the other three related cases in which cross motions were pending.[5] Moreover, Rawl itself submitted extrinsic evidence in support of its motion for summary judgment and in its opposition to the Trusts' cross motion. In fact, Rawl submitted two three-ring binders full of such evidence.

The Court is not persuaded that Rawl's alleged inability to conduct discovery justifies granting Rawl's Motion for Reconsideration. Whatever Rawl thought its "agreement" was regarding discovery, Rawl could have filed a rule 56(f) motion, either before the West Virginia court or before this Court, if it was serious about engaging in discovery. *See* Fed.R.Civ. P. 56(f). That Rawl made the strategic decision not to file such a motion does not now justify reconsidering this Court's ruling so that Rawl may engage in belated discovery.

2. Genuine Issues of Material Fact

a. Additional Extrinsic Evidence

Rawl's most compelling argument is that, based on extrinsic evidence that it has submitted with its motion for reconsideration, there are genuine issues of material fact that preclude summary judgment. Rawl has attached to its motion and supplemental memo five declarations purporting to show that it never had any knowledge of the evergreen clause and that the clause could not have the meaning the Trusts assert because such an interpretation was never communicated to the persons negotiating the collective

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[5] An affidavit filed by Penny Clark, counsel to the Trusts, also avers that Ms. Clark offered to make *all* of the information obtained through discovery in the cases pending before this Court available to Rawl with an appropriate protective order. Rawl declined this offer.

bargaining agreements on behalf of the employers. The five persons submitting affidavits on behalf of Rawl are Arch Runyon, the vice president of administration for Rawl and the person responsible for employee benefits and labor relations; E. Morgan Massey, who in 1978 was the president of several affiliated companies that were members of the BCOA[6] and who served on the Board of Directors of the BCOA in 1978; Melvin Triolo, the Secretary/Treasurer of the Logan Coal Operator Association (LCOA) who represented LCOA as a BCOA director during the negotiations with UMWA over the 1978 NBCWA; Nicholas Camicia, the former chairman of the Pittston Company and one of the negotiators of the 1978 NBCWA; and Stoney Barker, Jr., who was a member of the Executive Committee of the BCOA during the 1978 negotiations. Each of these affiants states that despite his participation or involvement in the 1978 negotiations, he never was apprised of the evergreen clause—in fact never even heard of it—until the Trusts began to bring these cases in the mid to late 1980s. Although Mr. Massey was a member of the Board of Directors of the BCOA, he allegedly was never asked to ratify the clause. Similarly, although Mr. Barker was on the Executive Committee of the BCOA during the relevant negotiations, he does not recall the Executive Committee ever giving the Benefits Subcommittee the authority to negotiate a continuing contributions clause. Virtually each of the five affiants attests that he believed the obligation to contribute to the Trusts would cease with the expiration of the collective bargaining agreements.[7]

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[6] These companies later merged into Rawl.

[7] By way of comparison, the Court notes that one of the declarations relied on by the Court in its Memorandum Opinion was the declaration of Roger Haynes, the chairman of the BCOA Benefits Subcommittee that negotiated the evergreen clause. Mr. Haynes averred that the evergreen clause was specifically negotiated to ensure that coal operators who voluntarily agreed to participate in the Trusts could not later walk away from their obligations at the expense of the remaining employers. *See* Mem.Op. at 665.

Additionally, the Court notes that its Memorandum Opinion relied on the congressional testimony given by Donald Pierce, a UMWA negotiator during the 1978 negotiations, when Congress was considering the Multiemployer Pension Plan Amendments Act of 1980. Only two years after the negotiations,

The Court's question is: why didn't Rawl submit these declarations with its opposition to the Trusts' motion for summary judgment? In that motion, the Trusts made it clear that they were relying on evidence of the negotiating history of the evergreen clause to support their position. They submitted the declarations of several of the negotiators of the Trust documents. Rawl could have submitted the same declarations then that it seeks to submit today. It did not need discovery to obtain these declarations, which are hardly "newly discovered" evidence. Apparently, Rawl chose to ignore the extrinsic evidence and rely on its arguments about plain language and federal labor policy. Perhaps it was concerned that if it submitted declarations that conflicted with those submitted by the Trusts, the Court would hold that genuine issues of material fact precluded summary judgment. Only now, after the Court has rejected its other arguments, does Rawl seek to show that there are genuine issues of material fact by submitting extrinsic evidence that has been available to it since the inception of this litigation.[8] Such

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Pierce testified before Congress that the negotiators specifically included the evergreen clause in order to keep participating employers "in the fold" and to require them to continue contributing into the future based on contributions called for in successor agreements to the NBCWA. *See* Mem.Op. at 666.

[8] Rawl may be attempting to show more through these declarations than actually exists. None of them provide [sic] affirmative evidence of a contrary interpretation of the evergreen clause. Rather, they merely establish that several people who were in positions to know about the evergreen clause in fact did not know about the clause until the Trusts began bringing the evergreen cases. Moreover, the Trusts argue that the evergreen provision did not engender a lot of debate because it was not controversial—the negotiators were able to agree to it with little discussion.

More troubling than Rawl's "new" declarations, however, is Rawl's discovery of another case in which, after a company ceased contributing to the Trusts, the Trusts sought withdrawal liability rather than seeking to enforce the evergreen clause. Four of the cases were discussed at length in this Court's Memorandum Opinion. *See* Memorandum Opinion at 672-674. The Trusts continue to argue that this was the inadvertent result of their failure to focus on the clause until employer withdrawals began to become a problem. The case discovered by Rawl was brought by Kelley Coal against the Trusts in 1987 to contest the Trusts' assessment of withdrawal liability against the company. In

manipulation of the litigation process is not condoned by the Federal Rules of Civil Procedure or by this Court.

b. Improper Weighing of the Evidence

Also in support of its argument that summary judgment was inappropriate, Rawl argues that the Court improperly "weighed" the evidence before it when it concluded that the evergreen clause was intended to create a binding obligation on employers. Rawl argues that, in cases involving contract interpretation, unless the contract is wholly unambiguous, its interpretation raises a genuine issue of material fact that cannot be resolved through summary judgment.

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that case, the Trusts took the position that Kelley had withdrawn from the Trusts in 1984 when its 1981 wage agreement providing for contributions to the 1950 Trusts expired and it did not enter into a successor agreement providing for such contributions. Kelley took the position that it had not withdrawn from the plan, but had "suspended contributions under the plan during a labor dispute involving its employees" within the meaning of ERISA. Neither party discussed or relied on the evergreen clause. The case was "administratively closed" when Kelley Coal filed a voluntary petition in bankruptcy. *See* Rawl's Motion for Reconsideration, Exhibit 4.

Also troubling is a "Q & A" on withdrawal liability that was ratified by the Trustees in August 1981. In response to the question "When does a 'complete withdrawal' within the meaning of Section 4201 of ERISA occur?" the Q & A states, among other things, "where . . . (c) an employer becomes non-signatory." Attachment 2 to Rawl's Supplemental Memorandum in Support of Motion for Reconsideration. This is precisely the position taken by Rawl and the other defendant employers in these cases: that their obligations ceased when they no longer were signatories to an NBCWA or "me-too" agreement incorporating the terms of the NBCWA. The Trusts' rebuttal to this evidence is the same as their rebuttal to the withdrawal liability cases: the trustees did not participate in the negotiation of the Trust language and did not focus on it until the mid to late 80s when the withdrawal of employers from the Trusts began to be a problem.

As with the declarations, the Court is concerned about Rawl's failure to submit this evidence until after it lost its motion for summary judgment. According to the Trusts, both the *Kelley* case and the Q & A had been produced in discovery to the other defendants long before summary judgment motions were filed. Rawl was given the opportunity to examine this discovery. Its failure, apparently for strategic reasons, to withhold this evidence until now has the appearance of sandbagging and gives the Court great concern.

Air Transport Ass'n of America v. Lenkin, 899 F.2d 1265 (D.C.Cir. 1990) (per curiam), sets forth the standard quite succinctly. In that case, the appellate court affirmed the district court's grant of summary judgment although the contract's language was ambiguous. The appellate court agreed with the district court "that consideration of extrinsic evidence 'emphatically supports' appellees' position." *Id.* at 1266 (citing district court opinion). It went on to state:

> At first glance, it might appear that a case involving an arguably ambiguous contract requiring consideration of extrinsic evidence for definitive resolution would be inappropriate for summary judgment. As this court has stated, however, in cases where extrinsic evidence is "so clear that it cannot fairly be said that the material issue of intent is genuinely in dispute," summary disposition is appropriate. *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 684 n. 23 (D.C.Cir.1985),

Id. at 1266-67.

In this case, the Court concluded, after reviewing the voluminous evidence submitted by the Trusts, that the only reasonable interpretation of the evergreen clause is that it was intended to create a continuing obligation to contribute. Based on what was before the Court at the time, as well as on the parties' strenuous arguments that there were no genuine issues of material fact in dispute, the Court concluded that summary judgment was appropriate. Only after the defendants lost did they begin to argue that summary judgment was inappropriate. The Court continues to stand by its original conclusion.

3. Rawl's Affirmative Defenses

Rawl argues that the defenses of statute of limitations and laches are available and it should be given the opportunity to conduct discovery regarding these defenses in order to present them to the Court. Rawl argues that the three-year statute of limitations applicable to contract cases is applicable to this case. It also argues that the plaintiff Trusts have unreasonably denied bringing their claims and that this delay has prejudiced Rawl, thus

barring this case based on laches. To pursue either of these defenses, Rawl argues that it will be necessary to engage in discovery.

Rawl has waived these affirmative defenses by not asserting them in its own motion for summary judgment and, more importantly, by not asserting them in its opposition to the Trusts' motion for summary judgment. If Rawl believed it needed discovery to assert these defenses, it should have asked for discovery rather than moving forward with its motion on the merits. *See Federal Deposit Insurance Corp. v. Simon*, 607 F.Supp. 1254, 1256 (D.C.Ill.1985) (affirmative defense raised in answer abandoned due to defendant's failure to respond to plaintiff's motion for summary judgment); *Attorney General of United States v. The Irish People, Inc.*, 595 F.Supp. 114, 120 n. 9 (D.D.C.1984) (noting that it appeared that defendant had abandoned its affirmative defenses because it did not raise them in its motion for summary judgment or cross motion to the plaintiff's motion for summary judgment), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C.Cir.1986).

4. Collateral Estoppel Effect of Island Creek Cases

Rawl's fourth argument, regarding the collateral estoppel effect of Judge Harris' decision in the *Island Creek* cases, was fully analyzed in this Court's Memorandum Opinion and will not be rehashed here. Rawl has submitted no new evidence or argument requiring reconsideration of this issue.

5. Conclusion

Motions for reconsideration are not specifically provided for under the Federal Rules of Civil Procedure. The most analogous rule, however, is rule 60, which provides for relief from a final judgment or order. That rule states that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could

> not have been discovered in time to move for a new trial under Rule 59(b). . . .

Fed.R.Civ.P. 60(b). This rule, by its terms, applies only to "final" judgments and orders. In this regard, the Advisory Committee Note states that:

> The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The Fourth and Fifth Circuits have held that a motion to reconsider an interlocutory order is not governed by rule 60(b), but is within the discretion of the trial court, subject to appellate review under the abuse of discretion standard. *See Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462 (4th Cir.1991); *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345 (5th Cir.1989). *See also* 7 Moore's Federal Practice, ¶ 60.20 ("Interlocutory orders and judgments are not within the provisions of 60(b), but are left within the plenary power of the Court that rendered them to afford such relief from them as justice requires.").

According to the Fifth Circuit, in ruling on a motion for reconsideration, a judge must "consider judicially the record as it exists at the time of the motion for reconsideration not just as it existed at the time of the initial ruling." 888 F.2d at 349. In the *Xerox* case, a shareholder derivative suit, the trial court granted the defendant's motion for summary judgment and denied plaintiff's rule 56(f) motion for a continuance to conduct discovery to rebut the affidavits submitted with the motion to dismiss. Plaintiff filed a motion for reconsideration, supported by many documentary exhibits from a related case. The trial court denied the motion for reconsideration and the Fifth Circuit reversed, stating as follows:

> Because these documents reflect the existence of genuine issues of material fact, the trial judge knew positively at that

> time that his earlier grant of summary judgment could no longer be justified. He could not turn his back on such an overwhelming showing. He was obliged to reconsider and rescind the interlocutory summary judgment order. Failure to do so constituted an abuse of discretion.

Id. at 356.

There are several facts that distinguish the *Xerox* case from the *Rawl* case. First, in *Xerox*, the plaintiff moved for a continuance in order to conduct discovery before the court ruled on the pending motion for summary judgment. In the *Rawl* case, Rawl made no such motion, even though it was obvious from the Trusts' briefs that extrinsic evidence had been submitted and relied upon. Second, in *Xerox*, the information plaintiff sought through discovery was information that could only be provided by the ex-directors of the defendant and was not in the plaintiff's possession. With its motion for reconsideration, the plaintiff was able to establish, through the submission of the ex-directors' statements in other related litigation, that discovery was necessary and was likely to produce evidence rebutting the defendants' showing. In *Rawl*, everything that Rawl has now submitted as evidence of a factual dispute has been available to Rawl all along. The affidavits submitted with its motion for reconsideration came primarily from its own employees and those of the other defendants. Rawl did not need any discovery to obtain these affidavits. The *Kelley* case and the Q & A on withdrawal liability had been produced by the Trusts well before summary judgment motions were filed. In short, none of what Rawl submits today is truly "new." Rather, it was withheld from the Court until it became useful to Rawl.

Finally, in *Xerox*, the information presented to the trial judge with the motion for reconsideration raised genuine issues of material fact with respect to the defendant directors' breach of their fiduciary duties. In the *Rawl* case, the affidavits submitted by Rawl establish only that officials of the Rawl companies were unaware of the evergreen clause; they do not establish that the

evergreen clause was not intended to create a continuing obligation to contribute.[9]

The Court is concerned about the effect of the evidence submitted by Rawl in support of its motion for reconsideration, particularly in light of the pendency of two other cases regarding the evergreen clause. Nevertheless, the Court finds this case distinguishable from the *Xerox* case, in which the failure to present relevant evidence was not the fault of the nonmoving party. In this case, the Court can conclude nothing other than that Rawl made a decision, as part of its litigation strategy, to withhold its own evidence of negotiating history and base its entire argument for summary judgment on plain language and

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[9] The facts of the Fourth Circuit's opinion in *Fayetteville Investors* are so different from those in *Rawl* that they provide little guidance for this Court. In that case, the trial court denied reconsideration of a motion to dismiss primarily because the plaintiff submitted evidence without explaining why that evidence had not been submitted in its opposition to the defendant's motion to dismiss. The appellate court's reversal of the trial court's denial of reconsideration was based on the fact that it is not the plaintiff's burden, in opposing a motion to dismiss under rule 12(b)(6), to come forward with all of the facts of the case. The appellate court specifically noted that the parties had acknowledged on the record that they did not seek to convert the 12(b)(6) motion into a summary judgment motion. The appellate court did not indicate whether the trial court's denial of reconsideration would have been appropriate had the motion been for summary judgment and had the plaintiff still failed to come forward with rebuttal facts and affidavits until moving for reconsideration.

Assuming that the result would have been different had the motion been for summary judgment rather than to dismiss, this Court is in full agreement with the trial court's rationale for denying reconsideration:

> A party should not be permitted to use a motion to reconsider as a vehicle to introduce additional evidence which could have been adduced during the pendency of the prior motion. . . . Dispositive motions serve judicial economy by encouraging parties to winnow out extraneous issues. To compel their cooperation in this process, litigants face the dismissal of claims which are not adequately supported by the early and full disclosure of all material facts. This system is compromised if courts allow litigants to control the time at which evidence will be produced.

936 F.2d at 1470 (quoting the trial court's order).

federal labor policy. That Rawl was somehow "denied" discovery is a red herring—Rawl did not need any discovery to come up with what it has now submitted. If Rawl's tactics are to be condoned, it will render the strictures of rule 56 meaningless. Litigants will be free to put forth only the arguments that they think will result in summary judgment in their favor. Then, if that tactic fails, they will fall back on their withheld evidence to show the existence of material facts. Rawl wants to have its cake and eat it too. The Court will not allow this. Accordingly, the Court shall deny Rawl's Motion for Reconsideration.

B. *Motion to Amend and Certify for Interlocutory Appeal*

Pittston's Motion for Amendment seeks three things: (1) an amendment of the January 31, 1992 Memorandum Opinion and Order certifying this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); (2) an amendment clarifying that summary judgment was not entered against Thames Development, Ltd. (Thames) and The Pittston Company (The Pittston Company is the parent of the numerous defendant coal operators, referred to in the Memorandum Opinion and herein as the PCG Companies); and (3) to dismiss the complaint against Thames and Pittston.

1. Motion for Interlocutory Appeal

Pittston's arguments in support of an immediate interlocutory appeal are essentially the same as those made by Rawl in support of its Motion for Reconsideration.[10] Pittston argues that: (1) it is entitled to discovery to rebut the Trusts' evidence of negotiating history; (2) there are genuine issues of material fact; and (3) the Trusts should be barred by collateral estoppel. Like Rawl, Pittston has now come up with two declarations—that have been available since the inception of this litigation—allegedly supporting its position. These declarations are made by Joseph Farrell, the current Chairman and C.E.O. of Pittston who has been with the company since 1984, and by Paul Douglas, the former Chairman

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[10] At oral argument, counsel for Rawl represented that if its Motion for Reconsideration was denied, it joined with Pittston in seeking an interlocutory appeal.

and C.E.O. of Pittston from 1984 to 1991. Both state that they never knew that companies who withdrew from the NBCWA would nonetheless be required to continue to contribute to the Trusts at the rates negotiated between the BCOA and the UMWA. Mr. Douglas states that, had the PCG Companies known of this obligation when they decided to withdraw from the BCOA and negotiate their own agreements with the Union, they probably would not have proceeded as they did.

Interlocutory review is governed by 28 U.S.C. §1292(b), which provides, in pertinent part, that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Trusts argue that such a certification is for use only in exceptional cases. *See Tolson v. United States*, 732 F.2d 998, 1002 (D.C.Cir.1984). The Court does not take issue with this statement of the law; rather, the Court believes these are precisely the type of exceptional cases for which interlocutory appeal is appropriate. Among the "controlling question[s] of law as to which there [are] substantial ground[s] for difference of opinion" are: (1) whether the plain meaning of the evergreen clause should have governed the Court's decision; (2) whether the extrinsic evidence considered by the Court raised genuine issues of material fact; (3) whether federal labor law prohibits the Court's interpretation of the evergreen clause to create a continuing contribution; (4) whether the Trusts were collaterally or judicially estopped from bringing these cases under the evergreen clause; and (5) whether this Court is in error by denying Rawl's motion for reconsideration on the grounds that it strategically withheld information that was available to it at the time it filed its opposition to the Trusts' motion for summary judgment. The sheer volume of the briefs, the number of attorneys involved, and the obvious interest to the public attest to the substantial

differences of opinion engendered by each of these issues. The interpretation of the evergreen clause has such far-reaching consequences for the coal industry, the Union, and federal labor law, that the expedited and final resolution of its meaning is imperative.

The Trusts and the BCOA argue vehemently that certifying this case for interlocutory appeal will not "materially advance the ultimate termination of the litigation" because all that is left is to collect the information regarding hours worked and coal produced and calculate the amount of delinquent contributions owed. The only issue for which the Trusts anticipate further briefing is the appropriate contribution rate, which is contested.

The Trusts are obviously ignoring the protracted history of this litigation in arguing that it is near a final resolution. As much paper has been filed post-summary judgment as pre-summary judgment and a discovery dispute has already risen over collecting the information regarding hours worked and coal produced. In the Court's eyes, it is clear that these cases are still a far cry from final judgment and that, if the Court's legal conclusions on liability are not upheld, the time and money spent calculating the amount of contributions due will have been wasted.[11]

For these reasons,[12] the Court will grant Pittston's motion to the extent that it seeks an amendment of the January 31, 1992 Order certifying this case for interlocutory appeal. The Court will

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[11] The Court is reminded of the magnitude of these cases by the pendency of two somewhat related cases before Judge Jackson of this district. These cases, which involve the "guarantee clause" of the Trusts, have been reviewed by the Court of Appeals on four occasions and still remain before the trial court. *See UMWA 1950 Benefit Plan and Trust, et al. v. BCOA*, No. 89-1744 (D.D.C.); *UMWA 1974 Benefit Plan and Trust, et al. v. BCOA*, 90-0674, 1991 WL 131216. Additionally, a related case is currently pending in the Western District of Virginia. In that case, a class of retired miners has sought to enjoin the Trusts, pursuant to the "suspension clause," from suspending benefits under the 1974 and 1950 Benefit Plans. *See John Doe v. Connors*, No. 92-0022A (W.D.Va.).

[12] The Court has also considered the pendency of the appeal of the *Island Creek* cases, which may be dispositive of these cases.

also stay the proceedings in these and the related cases pending the outcome of the appeal. The Court encourages the parties to ask for an expedited appeal and argument because of the dire financial situation of the Trusts at this time as well as the impact any ruling will have on the related litigation and further collective bargaining between the Union and the defendants.

2. Amending the Order as to Thames and Pittston and Dismissing these Defendants

The Trusts concede that the January 31, 1992 Memorandum Opinion and Order should be amended to clarify that it does not apply to Thames and the Pittston Company (the parent companies). Neither of these companies was a signatory to the 1984 NBCWA. Thus, the Court shall amend its Order to reflect that it does not apply to either Thames or the Pittston Company. The Court shall withhold ruling on the dismissal of these defendants pending the interlocutory appeal of these cases.

CONCLUSION

For all of the foregoing reasons, the Court shall deny Rawl's Motion for Reconsideration and shall grant in part Pittston's Motion for Amendment of this Court's January 31, 1992 Order.

ORDER

In accordance with the Memorandum Opinion issued herewith and for the reasons stated therein, it is this 29th day of April, 1992,

ORDERED that the motion of Rawl Sales and Processing Co. for reconsideration of this Court's January 31, 1992 Memorandum Opinion and Order is hereby denied; and it is

FURTHER ORDERED that the motion of The Pittston Company, *et al.*, for an amendment of the Court's January 31, 1992 Order is hereby granted in part; and it is

FURTHER ORDERED that the Court's January 31, 1992 Order is hereby amended as follows:

It is FURTHER ORDERED that these cases are hereby certified for interlocutory appeal pursuant to 28 U.S.C. §

1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that the terms of this Memorandum Opinion and Order shall not apply to Thames Development, Ltd. and The Pittston Company.

And it is FURTHER ORDERED that all proceedings in these cases, including the plaintiffs' pending motion for a preliminary injunction, shall be stayed pending the interlocutory appeal.

1978 NBCWA Article XX(d)

Section (d) **Contribution by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked by each of the Employer's Employees who perform classified work under this Agreement.

BCOA may elect to change or convert the cents per ton basis of funding contained herein to a different method of funding so long as such alternate method produces the equivalent contribution to that provided herein on a cents per ton basis. It is further understood that if such election is exercised all references to cents per ton contributions or obligations arising therefrom in this Article shall be read as to reform such references to the appropriate method of funding.

(i) Into the 1950 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 95.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 95.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 95.0¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 35.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 35.5¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 35.5¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 75.0¢ per hour on

each such hour worked plus 8.5¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 76.0¢ per hour on each such hour worked plus 8.0¢ per ton on each such ton; for the period beginning March 27, 1980, and ending when this Agreement is terminated, 75.0¢ per hour on each such hour worked plus 8.0¢ per ton on each such ton.

(iv) into the 1974 Benefit Trust: for the period beginning on March 27, 1978, and ending on April 26, 1978, 16.5¢ per hour on each such hour worked; for the period beginning on April 27, 1978, and ending when this Agreement is terminated, 2.0¢ per hour on each such hour worked. Any signatory Employer who does not elect to implement coverage through a private insurance carrier(s) on the effective date of the Agreement shall contribute for the period beginning March 27, 1978, and ending May 31, 1978, an additional 86.0¢ per hour on each such hour worked.

(v) In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hours worked contributions converted to tonnage equivalents).

(a) Into the 1950 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 95.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 95.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 95.0¢ per ton on each such ton;

(b) Into the 1950 Benefit Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 35.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 35.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 35.5¢ per ton on each such ton;

(c) Into the 1974 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 58.5¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 59.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 58.0¢ per ton on each such ton; and

(d) Into the 1974 Benefit Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 1.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 1.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 1.0¢ per ton on each such ton.

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in paragraph (v) just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

(vi) At any time during the term of this Wage Agreement, the Bituminous Coal Operators' Association may reallocate the contributions to be paid under the respective subdivisions (i) and (ii) in this Section, which reallocation will increase the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will decrease the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, or which will decrease the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will increase the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, provided that notice shall be given to the Union, and to the Trustees (who shall in turn notify all contributing Employers) of the cents per ton to be allocated to each such Trust at least 30

days prior to the date the contributions become due and owing to the respective Trusts, subject to the following terms and conditions:

(a) In lieu of or in addition to making the reallocations set forth above, BCOA may, to the extent necessary to fund the benefits provided by the 1950 Benefit Plan and 1974 Benefit Plan during the term of this Agreement, increase the rate of contributions to be made to the 1950 Benefit Trust and 1974 Benefit Trust during the term of this Agreement, which contributions, as may be adjusted from time to time, shall be made all by Employers signatory hereto during the term of this Agreement. In the event the BCOA ceases to exist, or in the event that more than 50% of the tonnage membership of BCOA on the effective date of this Agreement has withdrawn prior to the time when such reallocation or adjustment in contributions is to be made to effectuate the guarantee of health benefits, then action to be taken under this Section, or any other Section of this Article requiring action by BCOA, may be taken by a majority vote, based on tonnage, of Employers who were BCOA members on the effective date of this Agreement.

(b) Except as otherwise specifically set forth in this Article, no monies previously paid into or due and owing to either Trust nor any assets of either Trust shall be transferred to the other Trust;

(c) No decrease in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which can reasonably be expected to cause the 1950 Pension Trust and Pension Plan to fail to meet the minimum funding standards set forth in Section 302 of Title I, Subtitle B, Part 3, of ERISA or Section 1013 of Title II, Subtitle A, Part I of ERISA, or to fail to satisfy any applicable provisions of the Internal Revenue Code of 1954, including Sections 401 and 501 of said Code;

(d) No increase in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which will increase the contributions of the Employers to such Trust to an amount in excess of those amounts which, for Federal income tax purposes,

are fully deductible by said Employers when paid into such Trust, pursuant to the provisions of the Internal Revenue Code of 1954;

(e) No reallocation of the contributions to be paid to the two Trusts shall be made which will increase the total combined contributions required by this Article to be made by the Employers to those two Trusts, except to the extent provided for in Section (d)(1)(vi)(a); and

(f) No decrease in the cents per ton to be contributed to the 1950 Benefit Trust shall be adopted which will result in any reduction of the benefits currently provided in the 1950 Benefit Trust, nor shall any change in the cents per ton to be contributed to the 1950 Benefit Trust be adopted which will cause the contributions of the Employers to such Trust not to be fully deductible as paid or accrued under the applicable provisions of the Internal Revenue Code of 1954.

(vii) Hours of work for purposes of Employer contributions to the plans and trusts described in this Article shall include all hours worked, or fractions thereof, by Employees in a classified job covered by this Agreement. Hours actually worked for which a premium pay of any type is provided shall be treated for purposes of Employer contributions to the Trusts as though worked on a straight-time basis. Reporting pay for hours not actually worked shall not be included for the purpose of making Employer contributions to the Trust.

(2) The Trustees are hereby directed to establish a royalty rate or rates for bituminous coal which is recovered from slurry ponds, sludge piles, and other coal refuse, which is sold during the life of this Agreement, and such royalty rate will be paid on each ton of such coal recovered for use or for sale. Royalty rates currently being paid for coal recovered from slurry ponds, sludge piles and other coal refuse shall remain in effect unless and until changed by the Trustees. All royalties payable by Employers pursuant to this paragraph shall be divided among the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust in proportion to the total contribution paid to each such Trust by all Employers for the month preceding the month in which such royalty is due and payable.

(3) The sole obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.

(4) The obligation to make payments to the Trusts specified in this Article shall become effective on the dates specified in the respective Subdivisions (i) through (v) of this Section, and the first payments are to be made on the 10th day of each month after such specified dates, and thereafter continuously on the 10th day of each succeeding calendar month.

(5) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Trusts, and to furnish to the International Union, United Mine Workers of America and to the Trustees of those Trusts a monthly statement showing on a mine-by-mine basis the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable. Payments to those Trusts shall be made by check payable, as appropriate, to:

"Trustees of the United Mine Workers of America 1950 Pension Trust"

"Trustees of the United Mine Workers of America 1950 Benefit Trust"

"Trustees of the United Mine Workers of America 1974 Pension Trust"

"Trustees of the United Mine Workers of America 1974 Benefit Trust"

The Trustees are hereby authorized to require each signatory Employer to make payment of all contributions to the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust by a single check made payable in such manner as may be specified by the Trustees.

(6) Payments shall be delivered or mailed to the office of the Trusts currently located at 2021 K Street, N.W., Washington, D.C. 20006, or as otherwise designated by the Trustees of those Trusts.

(7) Failure of any Employer signatory hereto to make full and prompt payments to the Trusts specified in this Article in the manner and on the dates herein provided shall be deemed a violation of this Agreement. This obligation of each Employer signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer during the life of this Agreement and it shall be deemed a violation of this Agreement, if any mine, preparation plant or other facility to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding any of the obligations hereunder.

(8) Each Employer agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that the Employer has made the required payment to the Trusts for the previous month, as required by this Article, or is delinquent in such payment, such notice to set forth the amount paid to the Trusts, or the amount of the delinquency, the tonnage produced and the hours worked with respect to the mine or mines under the jurisdiction of such local union.

(9) Title to all the monies paid into and/or due and owing to the Trusts specified in this Article shall be vested in and remain exclusively in the Trustees of those Trusts. It is the intention of the parties hereto that those Trusts shall constitute irrevocable trusts and that no benefits or money payable from those Trusts shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

(10) It is understood that the individual Employees of Employers agree through their representative, the United Mine Workers of America, to surrender any personal or individual right to or interest in monies paid or required to be paid to the Trusts pursuant to this Agreement.

(11) Any judgment obtained by the Trustees of the Trusts established pursuant to this Agreement for a default giving rise to damages accruing to more than one of the Trusts established hereunder shall be allocated by the Trustees among such Trusts

in proportion to the amounts owing to each which gave rise to such judgment.

ARTICLE XII

Any action of the Employers which may, or must, be taken hereunder may be taken by those Employers who at the time are parties to the Wage Agreement and who represent fifty-one percent (51%) or more of the total contributions made to the Trust during the calendar year (or such shorter period which may have elapsed after the effective date) previous to that in which the action is taken, and the Trustees shall be fully protected in acting in accordance with any action taken by such Employers, to the extent permitted by law.

Any Employer who employed any Participant eligible for coverage under, or who receives or received benefits under, the 1974 Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1974 Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1974 Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984.

Section (i) Withdrawal From 1974 Benefit Plan and Trust

(1) In addition to any other obligations set forth in this Agreement, the Employers hereby agree that, in the event that an individual Employer ceases, for whatever reason, to provide health benefits to pensioners (or their eligible beneficiaries) as set forth in Section (c)(3)(i) of this Article, ceases to have an obligation to provide such benefits, or ceases to have an obligation to contribute to the 1974 Benefit Trust, that Employer shall be considered to be in Withdrawal, and shall be liable to the 1974 Benefit Plan and Trust for Withdrawal Liability.

(2) Such Withdrawal Liability shall arise whether Withdrawal is caused by a cessation of covered operations by the Employer, the Employer's bankruptcy, failure of the Employer to execute a successor Agreement following the expiration of this or any successor Agreement, or for any other reason.

(3) The Employer's Withdrawal Liability shall be due and payable in a lump sum within 60 days after the Trustees of the 1974 Benefit Plan and Trust determine that a Withdrawal has occurred. The amount of Withdrawal Liability shall be the product of:

(i) The hourly contribution rate applicable to the 1974 Benefit Plan at the time of the Employer's Withdrawal, and

(ii) The total number of hours reported (or required to be reported) to the 1974 Benefit or Pension Plans for contribution purposes for the 60-month period immediately preceding the Employer's Withdrawal.

(4) The Trustees are authorized, in their sole discretion, to enter into any reasonable arrangement for the payment of Withdrawal Liability over a term not to exceed three years.

(5) It is expressly understood that the Withdrawal Liability referred to herein is a contractual contribution obligation of the Employer, and is subject to the provisions of Section 515 of the Employee Retirement Income Security Act of 1974, as amended. All such amounts shall be subject to assessment of liquidated

damages and interest, as provided for in the 1974 Benefit Plan and Trust.

(6) Nothing in this Section (i) is intended to expand, diminish or affect in any manner the rights of individual employees, retirees or dependents to benefits under any of the employee benefit plans referred to in this Article XX.

Section (j) Withdrawal From 1950 Benefit Plan and Trust

(1) In addition to any other obligation set forth in this Agreement, the Employers hereby agree that, in the event that an individual Employer ceases, for whatever reason, to have an obligation to contribute to the 1950 Benefit Trust, the Employer shall be considered in Withdrawal, and shall be liable to the 1950 Benefit Plan and Trust for Withdrawal Liability.

(2) Such Withdrawal Liability shall arise whether a Withdrawal is caused by a cessation of covered operations by the Employer, the Employer's bureaucracy, failure of the Employer to execute a successor Agreement following the expiration of this or any successor Agreement, or for any other reason.

(3) The Employer's Withdrawal Liability shall be due and payable in a lump sum within 60 days after the Trustees of the 1950 Benefit Plan and Trust determines that a Withdrawal has occurred. The amount of Withdrawal Liability shall be the product of:

(i) The hourly contribution rate applicable to the 1950 Benefit Plan at the time of the Employer's Withdrawal, and

(ii) The total number of hours reported (or required to be reported) to the 1950 or 1974 Benefit or Pension Plans for contribution purposes for the sixty-month period immediately preceding the Employer's Withdrawal.

(4) The Trustees are authorized, in their sole discretion, to enter into any reasonable arrangement for the payment of Withdrawal Liability over a term not to exceed three years.

(5) It is expressly understood that the Withdrawal Liability referred to herein is a contractual contribution obligation of the

Employer, and is subject to the provisions of Section 515 of the Employers Retirement Income Security Act of 1974, as amended. All such amounts shall be subject to assessment of liquidated damages and interest, as provided for in the 1950 Benefit Plan and Trust.

(6) Nothing in this Section (j) is intended to expand, diminish or affect in any manner the rights of individual employees, retirees or dependents to benefits under any of the employee benefit plans referred to in this Article XX.

[UMWA Funds Letterhead]

February 12, 1993

Re: Contributions to the United Mine Workers of America Health and Retirement Funds

Dear

This letter is to inform you of the obligations of under the "continuing contributions" or "evergreen" clause contained in all versions of the plan and trust documents of the UMWA 1950 Pension Plan and Trust, the UMWA 1950 Benefit Plan and Trust, the UMWA 1974 Pension Plan and Trust and the UMWA 1974 Benefit Plan and Trust. These documents, including the continuing contributions clause, have been incorporated by reference in the National Bituminous Coal Wage Agreements ("NBCWAs") since 1978. The Funds records reveal that, based on the continuing contributions clause, is delinquent to the UMWA Health and Retirement Funds.

On January 31, 1992 Judge Thomas Hogan, for the United States District Court for the District of Columbia, issued his decision in *In Re United Mine Workers of America Employee Benefit Plans Litigation*, 782 F. Supp. 658 (D.D.C. 1992). Judge Hogan ruled that, under the continuing contributions clause, employers who previously had signed NBCWAs incorporating the clause and having obligations to contribute to any of the four Trusts which make up the UMWA Health and Retirement Funds must continue to contribute to those Trusts at the rates provided in all successor NBCWAs, even though they have not signed a successor agreement.

Funds records indicate that was signatory to the NBCWA of 1981 which incorporated the continuing contributions

clause and contained a contribution obligation to all four Trusts. Therefore, has a continuing obligation to contribute to the Trusts based on the rates contained in all successor NBCWAs even if was not signatory to those Agreements. Contributions are due and owing based on the schedules of standard rates contained in the attachment to this letter. These schedules include rate adjustments established by the Bituminous Coal Operators Association pursuant to the "guarantee clause" found in Article XX(h) of the NBCWA. As indicated in the note at the end of the schedule of rates in effect during the NBCWA of 1988, some of these adjustments were adopted pursuant to court orders.

Please report and remit all delinquent contributions within fourteen days of the date of this letter. If contributions are not received by this date, the Funds will be prepared to initiate legal action to collect this debt.

Very truly yours,

Donald E. Pierce, Jr.
Executive Director

DEP:js

Attachment

Supreme Court, U.S.
FILED
JUN 3 1993
OFFICE OF THE CLERK

No. 92-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE PITTSTON COMPANY, *et al.*,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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---

BRIEF IN OPPOSITION

This petition from an interlocutory judgment of the Court of Appeals raises no issue worthy of the Court's attention. The only question it presents is whether summary judgment was correctly granted on a straightforward issue of contract interpretation. The evergreen clause, the contract provision at issue, was negotiated between the United Mine Workers of America ("UMWA") and a multiemployer association, the Bituminous Coal Operators Association ("BCOA"). It provides that each signatory employer is required to "mak[e] the contributions [to multiemployer pension and health benefit trusts] required under the [industrywide collective bargaining

agreement], as amended from time to time, *and any successor agreements thereto* . . . . " 984 F.2d at 471-72 n.1 (emphasis supplied). The district court found, and the Court of Appeals agreed, that there was no genuine dispute of material fact as to the meaning of this contract provision: the provision means "that participating employers . . . were bound to make continuing contributions to the trusts, and that the amounts of contributions would be specified in future [industrywide collective bargaining agreements]." 984 F.2d at 472. On that basis, the district court granted summary judgment to the plaintiff Trusts and against petitioners, The Pittston Company, *et al.* ("Pittston"), and the Court of Appeals affirmed that judgment.[1]

As we show in part I below, the first question presented by the petition rests on a misrepresentation of the decision below. Petitioners' agreement to a continuing obligation to make contributions to pension and health benefit trusts was an *exercise*

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[1] The respondents in this case are four multiemployer benefit trusts which provide pension and health benefits to retired and disabled coal miners and their families (hereafter "Trusts"). Effective February 1, 1993, while this case was pending in the Court of Appeals, the two respondent health benefits Trusts were merged into the United Mine Workers of America Combined Benefit Trust, an entity whose creation was mandated by the Coal Industry Retiree Health Benefit Act of 1992. *See* Subtitle C of the Energy Policy Act of 1992, H.R. 776, 102nd Cong., 2d Sess. (1992). At an appropriate time, the Trusts will file in the district court a motion requesting that the court substitute the Combined Benefit Trust for the plaintiff health benefit Trusts.

That 1992 Act is designed to secure the future funding of the health benefits that were provided by two of the four respondent Trusts. And although the Act does not affect the two health benefit Trusts' claims against Pittston and other employers for the period prior to February 1, 1993, payments under the Act will substitute for any contributions to those two Trusts under future National Bituminous Coal Wage Agreements ("NBCWAs").

of petitioners' right to bargain, not—any more than any contractual commitment—a waiver of any bargaining right. Moreover, as this Court has held in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the obligation to contribute to a multiemployer trust does not imply an obligation to be part of a multiemployer bargaining unit.

In part II below, we show that the second question presented by the petition raises no issue as to the applicable legal standard for determining motions for summary judgment. Petitioners claim only that the courts below misapplied the generally accepted legal standard. That claim of misapplication is not worthy of this Court's plenary consideration, and is based, moreover, upon a series of gross distortions of the record.

In part III below, we show that the third question presented by the petition is simply not raised in this case. The doctrine of judicial estoppel is not applicable where, as here, the parties and the claims were different in the earlier litigation that is relied upon for estoppel.

Certiorari should be denied.

REASONS THAT THE PETITION SHOULD BE DENIED

I. THE ALLEGED WAIVER OF PITTSTON'S STATUTORY RIGHT TO BARGAIN

a. Pittston asserts that this case would allow the Court to decide "whether an employer's right to select its own bargaining representative may be waived without the showing of a 'clear and unmistakable' intent to waive that right," citing *Metropolitan Edison v. NLRB*, 460 U.S. 693, 705 (1983). There is no such issue in this case.

The premise of petitioners' first question—that the evergreen clause is a *waiver*—is false. In a long line of decisions, the D.C. Circuit has warned against confusing a *waiver* of statutory rights—which occurs when a party "knowingly and voluntarily relinquishes its right to bargain about a matter"—with an *agreement* that "fixes the parties' rights and forecloses further mandatory bargaining." *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).[2] Where the parties to a collective bargaining agreement have agreed on rules that will govern their conduct, they have *exercised* their bargaining rights as to those rules, and the legal standards for finding a waiver of bargaining rights do not apply. Thus, the D.C. Circuit correctly rejected Pittston's argument that the evergreen clause constitutes a "waiver" of bargaining rights which must be "clear and unmistakable" to be enforced:

> "[T]o the extent that a bargain resolves any issues, it removes that issue *pro tanto* from the range of bargaining." Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When [Pittston and other employers] signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against [Pittston]. There is no issue of waiver in this case.

Id. at 479 (citation omitted). *Accord Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) ("'where the con-

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[2] *See also Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992); *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 943-44 (D.C. Cir. 1989).

tract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather, the contract will control'") (quoting *Local Union No. 47 v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991)).

The evergreen clause is a contractual obligation which continues as long as—but *only* as long as—the BCOA and the UMWA set national contribution rates for the Trusts. The precise extent of the evergreen obligation is pegged to the contribution rates agreed to in future NBCWAs. The use of a general industry standard for uniform contribution rates for multiemployer benefit plans is entirely commonplace in collective bargaining agreements.

We are aware of no authority supporting the proposition that a contractual obligation of this nature should be treated as a waiver of the right to bargain. Indeed, there are numerous cases in which courts have enforced employers' collectively-bargained obligations to provide retirees with lifetime pension and health benefits—obligations as long-term and potentially open-ended as those created by the evergreen clause[3]—and in none of these cases has the court ever analyzed the contractual obligation as a waiver.

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[3] *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The evergreen clause is unique in that employers undertake a long-term obligation to make specified *contributions* while, in most industries, employers enter into long-term contractual commitments to provide specified *benefits*. But there is no reason that federal labor policy would favor enforcement of the latter while disqualifying the former.

b. In any event, this question does not merit this Court's review. It is fully disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), which Pittston tries vainly to distinguish. In *Amax*, a case involving the same multiemployer funds as those at issue here, the Court rejected employer arguments that are closely analogous to those Pittston makes here. The employer argued that when the UMWA went on strike over a demand that the employer agree to participate in these multiemployer funds, it violated the Section 8(b)(1)(B) prohibition against "coerc[ion of] . . . an employer in the selection of his representatives for the purposes of collective bargaining," 29 U.S.C. § 158(b)(i)(B). *See* 453 U.S. at 326-27. This Court rejected that contention, explaining that participation in a multiemployer trust fund is not the same thing as participation in multiemployer bargaining. *Id.* at 334-38.

Pittston says that the *Amax* decision was based on the conclusion that trustees do not bargain. Petition at 17 n.11. But the Court's rationale was far broader. The Court concluded that very different federal labor policies apply to multiemployer trust funds and multiemployer bargaining:

> Congress enacted § 8(b)(1)(B) largely to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of employee grievances. . . . *However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly.* It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association,

> while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Id. at 334-35 (emphasis supplied).

If union pressure to contribute to a multiemployer benefit trust does not constitute pressure to join or continue multiemployer bargaining, it necessarily follows that the contract binding Pittston to continue to participate in a multiemployer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of Pittston's right to negotiate separately. For this additional reason, the first question presented does not merit this Court's review.

c. Pittston's effort to manufacture a conflict with respect to this issue is similarly unavailing. There is no conflict among the circuits with respect to whether the D.C. Circuit's distinction between a waiver and an exercise of bargaining rights is correct. The D.C. Circuit and the Seventh Circuit are the only circuits to have directly addressed this question, and they are in accord. *See supra* at 4-5.[4]

Similarly, Pittston's effort to interest the Court in this issue by suggesting that the case would allow the Court to settle the question whether the "clear and unmistakable" standard applies to waivers by *employers* as well as waivers by *employees* is a red herring. Petition at 16. There is no conflict among the circuits on this question, which was not addressed by the courts

---

[4] The Eleventh Circuit, too, has observed that the question whether a party has "waived" its right to bargain about an issue is entirely distinct from the question whether an issue is "covered" by a collective bargaining agreement. *See Mead Corp. v. NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983).

below and which, in any event, we have already shown is not presented by this case.[5]

II. THE PROPRIETY OF SUMMARY JUDGMENT

In affirming summary judgment for the Trusts, the Court of Appeals applied the well settled principles governing summary judgment set forth by this Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)—to wit, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "If the evidence [of the party opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).[6]

---

[5] Even if Pittston were correct—which it is not—that the evergreen clause waives bargaining rights and that there is a conflict among the circuits with regard to the applicable standard for determining whether a waiver has occurred, this case would not merit the Court's review. The record of this case plainly demonstrates that Pittston's alleged waiver of its statutory bargaining rights was "clear and unmistakable." *E.g.*, 984 F.2d at 475-76 ("the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial"). Thus, the result in this case would not change even if the waiver standard were applied.

[6] Although the Court of Appeals did not directly cite *Liberty Lobby*, it cited an earlier decision that specifically relied on that case, *see* 984 F.2d at 473; *Farmland Indus., Inc. v. Grain Bd. of Iraq*, 904 F.2d 732, 735-36 (D.C. Cir. 1990).

Pittston argues that the district court improperly "weighed" the evidence in granting summary judgment for the Trusts. However, Pittston simply fails to mention that, in denying the defendant employers' motion for reconsideration of the decision granting summary judgment to the Trusts, the district court explained its earlier comment that the Trusts' evidence

The Court of Appeals' application of that standard presents no issue worthy of this Court's review. The court first held that the "language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure to sign that NBCWA." 984 F.2d at 473.[7] The court further held that this interpretation of the clause was "corroborated by voluminous extrinsic evidence submitted by the Trustees," *id.* at 474. The court specifically referred to:

"greatly outweighed" that of the defendants:

> [I]n cases where extrinsic evidence is "so clear that it cannot fairly be said that the material issue of intent is genuinely in dispute," summary disposition is appropriate.
>
> In this case, the Court concluded, after reviewing the voluminous evidence submitted by the Trusts, that the only reasonable interpretation of the evergreen clause is that it was intended to create a continuing obligation to contribute.

App. 63 (citation omitted).

[7] This is the evergreen clause that was part of Pittston's agreement in 1984:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including but not limited to, the National Bituminous Coal Wage Agreement of 1984.* [Emphasis supplied]

> —"the sworn declarations of five people who were directly involved in the negotiations that led to the inclusion of the evergreen clause in the 1978 trust documents," *id.*;
>
> —"copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation," *id.*;
>
> —"various BCOA and UMWA documents prepared shortly after the negotiations were concluded," *id.*; and
>
> —"public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation. *See, e.g., Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Subcomm. on Educ. and Labor*, 96th Cong., 1st Sess. 418 (1979) (statement of Donald Pierce, economist, UMWA)." *Id.*

The court concluded:

> Thus, not only is the language of the evergreen clause clear in its effect of permanently binding signatory employers to the contribution rates established in current NBCWAs, but it appears that negotiators on *both* sides of the bargaining table at the 1978 negotiations understood the import of that language.

Id. (emphasis supplied).

Pittston seriously distorts the record when it asserts: "At no time during the ten years between the 1978 NBCWA and the filing of this lawsuit had anyone ever made any reference to the so-called evergreen clause . . . ." Petition at 5. The record contains the *1979* testimony before Congress of Donald Pierce, a key UMWA negotiator, Pierce's *1981* affidavit before

the National Labor Relations Board in a case in which the UMWA asserted that the evergreen clause required continuing contributions after contract expiration, and the *1979* report of yet another UMWA negotiator to the President's Commission on Coal, as well as internal BCOA memoranda prepared within a few months after the 1978 negotiations were concluded. Those documents describe the clause on which the present case depends, as well as the intent to create continuing liability for uniform contributions to the Trusts.[8]

Pittston's repeated assertions that it presented "substantial evidence" supporting its interpretation of the evergreen clause, *e.g.*, Petition at 6, is simply false. As the Court of Appeals stated, "[c]onfronted with [the Trusts'] well supported motion for summary judgment, [Pittston] w[as] able to respond only with a counter-intuitive reading of the pertinent language and references to the Trustees' failure to previously enforce the perpetual obligations explicit in the contractual provisions." 984 F.2d at 475. The Court of Appeals correctly held that the Trusts' previous enforcement of withdrawal liability, rather than the evergreen clause, against certain employers who ceased to make contributions to the Trusts was not evidence of the *intent* of the evergreen clause "since the legal basis for withdrawal liability does not turn upon the [evergreen clause]" and "[s]ince the evergreen clause was not litigated in the with-

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[8] The Court may also note that Pittston's innuendo that Donald Pierce's affidavit in support of the Trusts' interpretation of the evergreen clause was simply the creation of counsel, *see* Petition at 20, is belied by Mr. Pierce's 1979 testimony before Congress, *see* J.A. 566-67, and his 1981 affidavit to the National Labor Relations Board, *see* J.A. 567, 585. In addition, Pittston's assertion that Pierce made a remark in 1988 that was inconsistent with his later (and earlier) sworn statements is untrue. *See* Petition at 7-8, 20. Pierce's 1988 remark did not address the *meaning* of the evergreen clause, but only legal questions as to whether it would be *enforced*. J.A. 1123.

drawal liability cases. . . ." *Id.* at 475 & n.10.[9]

The remaining evidence that Pittston relies on in its petition was—as it concedes—submitted to the district court only *after* summary judgment was granted, in support of a motion for reconsideration. *See* Petition at 8. Pittston does not mention that the district court declined to consider that belated evidence. *See* App. 61. The Court of Appeals affirmed on that point, however, holding that the district court did not abuse its discretion in denying the motion for reconsideration based on defendants' failure to offer this evidence before judgment was entered. 984 F.2d at 476-77. That ruling presents no issue for this Court's review, and the belated evidence should not be considered here.[10]

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[9] Pittston also relies on a provision added to the *1988* NBCWA which provided for contractual withdrawal liability to the benefit Trusts if employers ceased to be obligated to contribute to those Trusts. But, as the Court of Appeals stated, this provision applies only if the employer is not "otherwise obligated to contribute to the funds (*e.g.*, no new NBCWA is enacted); it does not imply that the drafters of the 1988 agreements understood that employers have the right to terminate their obligations." 984 F.2d at 475 n.8. And, in any event, "the understanding of the drafters of the 1988 NBCWA is immaterial for the purpose of divining the intent of the drafters of the 1978 NBCWA." *Id.*

[10] The Court of Appeals also stated that, "even if we were to consider the material belatedly offered by Rawl, we would still conclude that the District Court did not abuse its discretion by refusing to reconsider its judgment. A party opposing summary judgment, when faced with specific evidence that demonstrates the absence of a material factual dispute, cannot defeat the motion simply by offering general denials. Here none of the affidavits or declarations submitted in conjunction with the motion for reconsideration were of persons who negotiated or drafted the evergreen clause." *Id.*; *see also* 984 F.2d at 474.

III. JUDICIAL ESTOPPEL

This case does not present an occasion for this Court to resolve any differences among the courts of appeals on the doctrine of judicial estoppel. As petitioners concede, both courts below declined to apply that doctrine. Petition at 26. Although Pittston argues that the courts *should* have applied it, there is no conflict among the circuits on that question.

The Court of Appeals noted that, because the evergreen clause was never at issue in any of the withdrawal liability cases on which Pittston based its estoppel arguments, the Trusts had not "contradict[ed] earlier sworn statements or present[ed] conflicting interpretations of the evergreen clause to successive tribunals." 984 F.2d at 477. All that had happened, the court said, was that "the Trustees have simply asserted alternative grounds for recovery against different litigants based on different sets of facts." *Id.* No case that Pittston has cited—and no case of which we are aware—has applied the doctrine of judicial estoppel in remotely similar circumstances. Every circuit that applies the doctrine of judicial estoppel applies it not to bar litigants from urging different, even "logically inconsistent," positions in cases involving unrelated parties, *see* Petition at 27 n.18, but instead to bar inconsistent representations with respect to the same facts or claims.

The cases from the Third and Seventh Circuits on which Pittston relies to intimate that there is a conflict between the circuits on this issue are good examples of *our point*. They provide no evidence, as Pittston would have it, that the result in Pittston's case would have been different in one of those circuits. In *Delgrosso v. Spang & Co.*, 903 F.2d 234, 241-42 (3d Cir.), *cert. denied*, 498 U.S. 967 (1990), an employer made inconsistent factual representations in the same proceed-

ing about the source of surplus funds in its pension plan. In *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993), the court ruled that a party in a bankruptcy case could not assert an interest in an industrial park when he had testified in a prior divorce proceeding that he had no interest in that property. And in *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548-49 (7th Cir. 1990), the court of appeals held that the purchaser of a business, having prevailed on a claim that the former manager had competed against the business prior to the sale without the seller's knowledge or authorization, could not then prevail in a separate suit for fraud based on allegations that the seller had wrongfully failed to disclose the fact of the manager's competition—which it both knew about and had authorized.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1945

In The

Supreme Court of the United States

October Term, 1992

THE PITTSTON COMPANY, et al.,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF BIG STAR COAL COMPANY, BLUE CHIP COAL CORP., DOSS FORK COAL CO., INC., IVY BRANCH COAL COMPANY, INCORPORATED, LETA'S TRUCKING CO., INC., McKINNEY TRUCKING CO., INC., MULLINS & STANLEY TRUCKING COMPANY, INC., MULLINS ENTERPRISES, INC. OF VA, PATTY CHANDLER TRUCKING, INC., RIGHT FORK COAL CO., INC., SAN-WEST COAL CO., INC., AND STONEY FIELDS TRUCKING, INC., AS AMICI CURIAE IN SUPPORT OF PETITION

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Pursuant to Supreme Court Rule 37, Big Star Coal Company, Blue Chip Coal Corp., Doss Fork Coal Co., Inc., Ivy Branch Coal Company, Incorporated, Leta's Trucking Co., Inc., McKinney Trucking Co., Inc., Mullins & Stanley Trucking Company, Inc., Mullins Enterprises, Inc. of VA, Patty Chandler Trucking, Inc., Right Fork Coal Co., Inc.,

San-West Coal Co., Inc., and Stoney Fields Trucking, Inc., respectfully submit this brief as Amici Curiae in support of the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia. This brief is filed with the consent of the parties.

STATEMENT OF INTEREST

Amicus companies are small, locally owned businesses performing contract mining or trucking services for other, larger coal companies. In the language of the industry, the amicus companies are known as "contractors." If a contractor works for a company whose employees are represented by the United Mine Workers, the contractor's employees are also usually represented by the union.

When the larger coal companies negotiate and sign new collective bargaining agreements with the union, their contractors sometimes follow suit, executing what are known as "me too" agreements. On some occasions, however, contractors are able to negotiate financial concessions and terms that the union may be unwilling to make with larger companies. These concessions and terms may be necessary for the contractor to continue to operate and maintain employment.

The Bituminous Coal Operators Association (BCOA) and the United Mine Workers of America (UMWA) negotiated National Bituminous Coal Wage Agreements (NBCWAs) in 1978, 1981, and 1984. These agreements were made for stated durations and have now expired.

The agreements incorporated by reference the UMWA pension and benefit trusts and specified certain contribution rates by employers. While the amicus contractors were not members of the BCOA, the companies that employed them were, and the contractors signed NBCWAs in one or more of the years in question.

The respondent UMWA Funds assert that a provision in the trust agreements – now conveniently called the "evergreen" clause – obligates employers to continue to pay into the Funds notwithstanding termination of the collective bargaining agreements signed by them. The amicus contractors were unaware of any such obligation when they signed their collective bargaining agreements with the union. In fact, the contractors never heard of the "evergreen" clause or any other theory of perpetual liability until this controversy arose ten years after the provision in question originated. (See affidavits appended to this brief.)

According to the respondent Funds, and the D.C. Circuit, once a company signed a NBCWA it became obligated to pay into the Funds for the duration of that agreement *and* any subsequent NBCWA. Under this reasoning, the contractors face previously unimagined liability which they are powerless to control. Although the 1978, 1981, and 1984 agreements signed by the contractors have expired, the Funds and D.C. Circuit would require continued contributions based on rates specified in subsequent agreements negotiated between the BCOA and the union – so long as there is such an agreement. Thus, for as long as they choose, the BCOA and the union can control contributions from everyone who signed a NBCWA in 1978 or later.

Part of the respondent Funds' claims against the petitioners and the amicus contractors is for contributions to the UMWA 1950 pension and benefit trusts. Several of the amicus companies never had any employees who will be eligible for benefits from these trusts. The UMWA gave four or more of the amicus contractors express written waivers of any obligation to contribute to the 1950 trusts. The respondent Funds maintain that these waivers are invalid and that the UMWA cannot alter the perpetual "evergreen" obligation.

The contractors, along with other companies in the industry, are therefore vitally interested in the outcome of this case given its potential application to them. The contractors have already been sued by the respondent Funds in the Western District of Virginia on the same "evergreen" theory used against Pittston and Rawl. *United Mine Workers 1974 Pension Trust v. Big Star Coal Co.*, Civil Action No. 93-0031-A. The Funds have requested the Judicial Panel of Multidistrict Litigation to transfer the Virginia case to the District of Columbia. If the case is transferred, the amicus contractors will find themselves before the same courts that entered and affirmed summary judgment against Pittston and Rawl.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXPRESSLY ADOPT THE DOCTRINE OF JUDICIAL ESTOPPEL FOR THE FEDERAL COURTS.

The issue in this case bearing perhaps the greatest significance for civil litigation in the federal courts was

largely ignored by the courts below: *Does the doctrine of judicial estoppel prevent a litigant in the federal system from advancing successive, mutually contradictory positions against different parties in different cases?* In a paragraph, the court of appeals declined to adopt the doctrine and concluded it was unnecessary even to "seriously consider" the issue in this case. *United Mine Workers 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir. 1993), *aff'g* 782 F. Supp. 658, *reconsid. denied*, 793 F. Supp. 339 (D.D.C. 1992).

The issue should be seriously considered. Civil litigation continues to flood the federal courts. The Court should carefully weigh any reasonable measure that will check the filing of successive, contradictory lawsuits. Such cases not only drain scarce judicial resourses, they also diminish the integrity of the legal system as a whole. If adopted, the doctrine of judicial estoppel will prevent this unnecessary and unfair burden on the courts and opposing parties.

Judicial estoppel generally operates to prevent a party from assuming contradictory positions in successive legal proceedings. "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Beyond this, the Court has elaborated little. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975); *Illinois v. Campbell*, 329 U.S. 362, 369 (1946).

Despite this Court's statement in *Davis v. Wakelee*, there is, as Pittston notes in its petition, a conflict among the circuits as to whether judicial estoppel should be recognized and applied in the federal courts. *Compare Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547-48 (7th Cir. 1990); *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 716 (9th Cir. 1990); *Young v. United States Dep't of Justice*, 882 F.2d 633, 639-640 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988); *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *with United Mine Workers 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991).

Although judicial estoppel is recognized in one form or another in most circuits and states, the courts disagree on the precise elements of the doctrine. *See* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981); Douglas W. Henkin Comment, *Judicial Estoppel-Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991); Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409 (1987). Differences exist, for example, on whether the party against whom estoppel is asserted must have been successful in the prior litigation, whether the party asserting the doctrine must have been a party or in privity with a party to the earlier litigation,

and whether that party must show some type of detrimental reliance or prejudice from the prior case or bad faith on the part of his opponent. *Id.*

In this case, the respondent Funds systematically, repeatedly, and successfully advanced a legal position that is irreconcilable with that now asserted against Pittston, Rawl, and the amicus contractors. Specifically, in numerous cases over a period of ten years after the "evergreen" clause was incorporated in the trust documents, the Funds imposed pension withdrawal liability on employers whose NBCWAs expired, representing to the courts that the employers no longer had an obligation to contribute to the Funds – a prerequisite to establishing liability against those employers. See Pittston's petition at pp. 6-8. The Funds now represent that the "evergreen" clause clearly imposes continuing contribution liability on employers beyond expiration of their contracts.

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court defined the parameters of collateral estoppel, resolving decades of debate about the scope of the doctrine. This case presents a corresponding opportunity for the Court to define the role of judicial estoppel in the federal courts and determine the limits on repetitive, inconsistent litigation.

II. EMPLOYERS' RIGHT TO SELECT THEIR OWN BARGAINING REPRESENTATIVES SHOULD NOT BE ABRIDGED

The amicus contractors are not, and never have been, members of the BCOA – the employer association that

negotiated the 1978, 1981, and 1984 NBCWAs in dispute. Yet, under the reasoning of the D.C. Circuit, by signing similar agreements, the contractors irrevocably committed themselves to make whatever future pension and benefit contributions the BCOA and UMWA decide they should make. Thus, while the BCOA can continue to negotiate and control its own contributions – and refuse to sign any agreement not acceptable to it – the contractors have forever relinquished that right. Paradoxically, the BCOA and the contractors signed the same agreement, yet the BCOA can decide what it pays and the contractors cannot.

All employers should be free to determine who their representatives will be in labor negotiations. *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); 29 U.S.C. § 158(b). Certainly, employers should not permanently lose that right by inference or construction of ambiguous contract provisions. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Yet, that is what has happened to Pittston and Rawl, and that is what is threatened against the contractors.

Joining a voluntary employer association is not a lifetime commitment. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982); *NLRB v. Sklar*, 316 F.2d 145 (6th Cir. 1963). And signing a three-year national contract does not foreclose future collective bargaining. *See District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985).

The decision below not only takes away petitioners' right to negotiate on a critical issue, it gives that right to the BCOA, an association of competing companies. Thus,

a handful of the most powerful companies can dictate the terms of the collective bargaining agreements for hundreds of smaller companies that signed contracts not knowing that they were giving up any future bargaining rights. This is wrong and unfair and should be overturned.

III. IN GRANTING SUMMARY JUDGMENT THE COURT BELOW EFFECTIVELY REVERSED THE PARTIES' BURDENS UNDER RULE 56.

A non-moving party whose opponent bears the burden of proof on an issue occupies a most-favored position under Rule 56. In order to successfully resist his opponent's motion, the non-moving party does not have to present any evidence. He has only to point out that there are holes in his opponent's case. It is the moving party's burden to show "that there is *no* genuine issue as to *any* material fact and that the moving party is entitled to judgment *as a matter of law*." Fed. R. Civ. P. 56(c) (emphasis added). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Instead of following these principles, the courts below silently reversed them, reconciling inconsistencies and ambiguities in the movant respondents' case, and concluding that the evidence of the nonmovant petitioners "fell short" of what the courts thought was necessary to "substantiate" the petitioners' claims. This can be demonstrated directly from the opinions:

- The district court found that the "evergreen" clause was ambiguous and proceeded to consider extrinsic evidence. 782 F. Supp. 658, 664.

The court went on to enter summary judgment for the Funds on the ground that their evidence was "voluminous and persuasive." Under Rule 56, the "volume" or "persuasiveness" of the Funds' evidence should have been of no concern to the court. Regardless of the weight of the Funds' evidence, Rule 56 required that the motion be denied if there were any genuine issues of material fact – which there surely were.

– The petitioners showed that one of the participants in the negotiations that lead to the "evergreen" clause made a prior statement inconsistent with the Funds' present interpretation of the provision. 782 F. Supp. at 666-67. While the district court "confesse[d] to a great deal of confusion over the import of [this] statement," the court was "persuaded" by a subsequent statement from the witness that the clause was intended to create a continuing obligation. 782 F. Supp. at 667. Again, the question under Rule 56 was not which statement was more persuasive but whether the inconsistency created an issue of material fact.

– The petitioners showed that the Trust Funds took the position in other litigation – directly contrary to their position here – that an employer's obligation to contribute terminated upon expiration of his collective bargaining agreement. 782 F. Supp. at 672-74. In response, the district court said: "Although the Court considers the Trusts' contradictory positions to be some evidence that the "evergreen" clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly outweighed by the other evidence before the Court." 782 F. Supp. at 674.

Under Rule 56, this finding compelled that the Funds' motions for summary judgment be denied, not granted.

– In dismissing the evidence of inconsistent conduct on the part of the Funds, the district court said it could "only speculate" that such conduct "may have been the result of a lack of communication between the attorneys filing the complaints and the trustees themselves." 782 F. Supp. at 674. Under Rule 56, the court was required to draw all reasonable inferences in favor of the nonmoving party, not to speculate in favor of the moving party.

– The court of appeals suggested that the contract and trust agreements were unambiguous but proceeded to consider extrinsic evidence, including declarations of what was intended, even though such evidence should not have been admissible if the contract were truly unambiguous. 984 F.2d at 473-74.

– The court of appeals found the petitioners' arguments as to the meaning of the "evergreen" clause to be "counterintuitive" and "unconvincing." 984 F.2d at 475. Again, these conclusions go to the weight of the evidence, not the existence of disputed facts.

– The court of appeals said that "the Coal Companies provided no extrinsic evidence to substantiate the reasonableness of their interpretation." 984 F.2d at 475. As parties not having the burden of proof and opposing summary judgment, the companies had no burden to produce any evidence "to substantiate" their position.

– In passing on the evidence of the Funds' inconsistent conduct, the court of appeals said:

> "We will not infer that the Trustees previously had a different interpretation of the clause simply because they made a rational business decision to sue under an alternative theory when certain employers failed to pay into the funds." 984 F.2d at 475. First, the Funds never contended that there was any "rational" business purpose behind their prior withdrawal liability suits. In fact, the Funds conceded that "their positions in the withdrawal liability cases and their position in these cases are logically inconsistent." Brief of Appellees in Court of Appeals at 46. Second, the court was not free to "rationalize" the Funds' conduct and draw inferences in their favor. To the contrary, under Rule 56, the court's obligation was to accept the inconsistency and draw all reasonable inferences in the petitioners' favor, chiefly, that the "evergreen" clause may not mean what the Funds now say it means.

Rule 56 does not, and was never intended to, take the place of trial. The nonmoving party who has no burden of proof on the issue does not have to convince or persuade the court of anything. Rather, he can confidently resist summary judgment on the failure of his opponent to demonstrate the absence of any material factual issues. The courts below lost sight of these basic principles. Certiorari should be granted. Rule 56 is too important to practice in the federal courts to be so misinterpreted and misapplied.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Mullins Enterprises, Inc. of VA,
Patty Chandler Trucking, Inc.,
Right Fork Coal Co., Inc.,
San-West Coal Co., Inc., and
Stoney Fields Trucking, Inc.

June 11, 1993

APPENDIX

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF STONEY F. FIELDS

Stoney F. Fields, first being duly sworn, deposes and states as follows:

1. I am Stoney F. Fields and reside at Route 1, Box 380, Haysi, Virginia 24256.

2. I am vice-president and general manager of Stoney Fields Trucking, Inc., a Virginia corporation.

3. Stoney Fields Trucking is engaged in the business of transporting coal by trucks from mine sites to preparation plants in Southwest Virginia.

4. Currently, Stoney Fields Trucking owns three trucks and has two employees – me and my son. My wife, Eurabell, is president of the corporation.

5. Stoney Fields Trucking has not had any contract with the United Mine Workers since the 1984 contract expired in 1988.

6. Stoney Fields Trucking has never made any contracts with the United Mine Workers in Washington, D.C., nor spoken to anyone in Washington, D.C. about such contracts.

7. Stoney Fields Trucking made its contracts with the union in Southwest Virginia.

8. Stoney Fields Trucking does not do any business in Washington, D.C.

9. I never heard of any "evergreen" clause or liability until this suit was filed. I thought that a company's obligation to contribute to the funds expired when the contract expired.

/s/ Stoney F. Fields
Stoney F. Fields

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Stoney F. Fields.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF FREDDIE R. LINKOUS

Freddie R. Linkous, first being duly sworn, deposes and states as follows:

1. I am Freddie R. Linkous and reside at Route 3, Box 510C, Clintwood, Virginia 24228.

2. I am president of Leta's Trucking Company, Inc., a Virginia corporation.

3. Leta's is engaged in the business of trucking coal from mines to preparation plants in Southwest Virginia.

4. Leta's does not conduct any business in the District of Columbia or any state except Virginia.

5. The last contract Leta's had with the United Mine Workers expired in 1988. When the strike began in 1989, Leta's had four employees represented by the union. Since the strike, Leta's has had no employees represented by the union.

6. When Leta's last contract expired in 1988, I did not think the company had any further obligation to make contributions to trust funds. I thought that when

the contract expired any obligation to contribute to the funds expired with it.

/s/ Freddie R. Linkous
Freddie R. Linkous

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Freddie R. Linkous.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993.

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF PALMER T. YATES

Palmer T. Yates, first being duly sworn, deposes and states as follows:

1. I am Palmer T. Yates and reside at Route 1, Box 305A, Clintwood, Virginia 24288.

2. I am president of Right Fork Coal Company, Inc., a Virginia corporation, engaged in the business of mining coal in Southwest Virginia.

3. Right Fork does not do any business in the District of Columbia or any state other than Virginia. The company is owned by me and members of my family.

4. All the contracts that Right Fork has had with the union have been made and negotiated in Virginia.

5. I thought that a company's liability to the funds was to be governed by its contract with the union and that once the contract expired the obligation to contribute expired with it.

6. The present contract that Right Fork has with the union was made on this understanding and expressly

exempts Right Fork from having to make payment to certain of the trust funds.

/s/ Palmer T. Yates
Palmer T. Yates

STATE OF VIRGINIA

COUNTY OF DICKENSON

Subscribed and sworn to before me this 5th day of May, 1993, by Palmer T. Yates.

/s/ Pamela C. Boothe
Notary Public

My commission expires: Feb. 28, 1995.

DOCKET NO 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF GARY O. BAKER

Gary O. Baker, first being duly sworn, deposes and states as follows:

1. I am Gary O. Baker and reside at Route 2, Box 66, Coeburn, Virginia 24230.

2. I am president of Ivy Branch Coal Company, a Virginia corporation.

3. Ivy Branch is engaged in the business of mining coal in Southwest Virginia and has one mine. The mine is presently shut down due to a roof fall. When the mine was operating, it employed twenty-three people.

4. Ivy Branch does not currently have any contract with the United Mine Workers. The last union contract Ivy Branch had expired in 1988.

5. Ivy Branch does not do any business in Washington, D.C. The company's only business is in Southwest Virginia.

6. I never heard of any "evergreen" clause or liability until this suit was filed. I thought that a company's

obligation to contribute to the funds expired when the contract expired.

/s/ Gary O. Baker
Gary O. Baker

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Gary O. Baker.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993.

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF EDWARD A. ASBURY

The undersigned, having first being duly sworn, under penalty of perjury or false statement, does hereby state as follows:

1. I am Edward A. Asbury and reside at 602 Summit Ave., Bluefield, Virginia 24605.

2. I am President of San West Coal Co., Inc. ("San West") a Virginia corporation, headquartered in Virginia, but authorized to conduct business in West Virginia and conducting coal mining ooperations [sic] only in West Virginia.

3. San West does not do any business in the District of Columbia or any states other than West Virginia and Virginia.

4. All of the contracts that San West has had with the U.M.W.A. have been negotiated and made in West Virginia.

5. I thought that a company's liability to the Funds was to be governed by its contract with the Union, and that once the contract expired, the obligation to contribute expired with it.

6. The present contract that San West has with the Union was made on this understanding and expressly exempts San West from having to make payment to certain of the Trust Funds.

7. I relied upon the representations of the Union that the waiver of contributions to the 1950 Plans which I negotiated was valid and entered into the contract under that understanding; otherwise, I would not have signed the contract because economic conditions were so bad that I didn't think that San West could operate at a profit without the waiver.

8. None of the current or past employees of San West have every drawn any benefits or participated in any way in either the 1950 Benefit Plan or the 1950 Pension Plan, nor are any expected to in the future.

This the 18th day of May, 1993.

/s/ Edward A. Asbury
EDWARD A. ASBURY

Taken, subscribed and sworn to before the undersigned Notary Public, this the 18th day of May, 1993.

My Commission Expires: November 18, 1994.

/s/ Deborah C. Sarver
Notary Public,
Mercer County,
West Virginia

[SEAL]

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF EDWARD A. ASBURY

The undersigned, having first being duly sworn, under penalty of perjury or false statement, does hereby state as follows:

1. I am Edward A. Asbury and reside at 602 Summit Ave., Bluefield, Virginia 24605.

2. I am President of Doss Fork Coal Company, Inc. a Virginia corporation, headquartered in Virginia, but authorized to do business in West Virginia and conducting coal mining operations only in West Virginia.

3. Doss Fork does not do any business in the District of Columbia or any states other than West Virginia and Virginia.

4. All of the contracts that Doss Fork has had with the U.M.W.A. have been negotiated and made in West Virginia.

5. I thought that a company's liability to the Funds was to be governed by its contract with the Union, and that once the contract expired, the obligation to contribute expired with it.

6. Doss Fork commenced mining operations in 1986 as a contract miner for Navaro Mining, Inc., which had obtained a waiver of contributions to the 1950 Benefit Trust from the U.M.W.A. for the benefit of its operations and Doss Fork separately entered into a labor contract with the Union at that time which contained a waiver of contributions to the 1950 Pension Trust.

7. In 1989 the Trustees of the 1950 Pension Trust and other trusts sued Doss Fork in the United States District Court for the Southern District of West Virginia for delinquent contributions (Civil Action No. 1:89-1151), and when collection of the Judgment obtained in that case was settled, the Trustees, by their attorney represented that the 1986 waiver of contributions to the 1950 Pension Trust was valid and would be recognized.

8. The present contract that Doss Fork has with the Union exempts Doss Fork from having to make payments to the U.M.W.A. 1950 Pension and Benefit Plans.

9. I relied upon the representations of the Union that the waiver of contributions to the 1950 Plans which I negotiated was valid and entered into the contract under that understanding; otherwise, I would not have signed the contract because economic conditions were so bad that I didn't think that Doss Fork could operate at a profit without the waiver.

10. None of the current or past employees of Doss Fork have ever drawn any benefits or participated in any way in either the 1950 Benefit Plan or the 1950 Pension Plan, nor are any expected to in the future.

This the 18th day of May, 1993.

/s/ Edward D. Asbury
EDWARD A. ASBURY

Taken, subscribed and sworn to before the undersigned Notary Public, this the 18th day of May, 1993.

My Commission Expires: November 18, 1994

/s/ Deborah C. Sarver
Notary Public,
Mercer County,
West Virginia

[SEAL]

BEFORE THE JUDICIAL PANEL
ON MULTI-DISTRICT LITIGATION

IN RE: UNITED MINE WORKERS OF AMERICAN EMPLOYEE BENEFIT PLANS LITIGATION	)))))	MDL DOCKET NO. 886

AFFIDAVIT OF JACK CHANDLER

Jack Chandler, having been duly sworn, deposes and states as follows:

1. I am Jack Chandler, Vice-President of Patty Chandler Trucking, Inc.

2. Patty Chandler Trucking, Inc. is owned by myself and my wife Patty Chandler.

3. Patty Chandler Trucking, Inc., ceased operations in September of 1991. Prior to that time, it hauled coal in Kentucky, and had no operations in the District of Columbia. The operations never involved more than 15 employees, and there were only 6 employees at the end of the operations in September of 1991.

4. Patty Chandler Trucking, Inc. has never had any employees who could be eligible for benefits under the UMWA 1950 Benefit Trust.

5. In 1988, Patty Chandler Trucking, Inc. entered into an agreement with the United Mine Workers of America under which the United Mine Workers agreed to waive any obligation to contribute to the UMWA 1950 Benefit Trust. Patty Chandler Trucking, Inc. relied on this

waiver in not making contributions to the 1950 Benefit Trust after 1988.

6. Prior to the recent demands for payment, I was not aware of any question about the validity of the waiver agreement and I had not heard of the "evergreen" clause. I have never seen the trust documents which are alleged to contain the "evergreen" clause.

7. All contracts that Patty Chandler Trucking, Inc. has made with the United Mine Workers were negotiated and signed by Patty Chandler Trucking, Inc. in Virginia.

8. Patty Chandler Trucking, Inc. has paid all sums for it owed under its 1988 agreement with the United Mine Workers, including payments to the UMWA 1974 Benefit Trust, the UMWA 1974 Pension Trust, and the UMWA 1950 Pension Trust.

9. Patty Chandler Trucking, Inc. has been assessed and paid withdrawal liability following the end of its operations.

/s/ Jack Chandler
JACK CHANDLER

STATE OF VIRGINIA

CITY OF BRISTOL

Subscribed and sworn to before me this 18th day of May, 1993, by Jack Chandler.

/s/ Donna D. Adams
Notary Public whose
commission expires 10-31-97

BEFORE THE JUDICIAL PANEL
ON MULTI-DISTRICT LITIGATION

IN RE: UNITED MINE WORKERS OF AMERICAN EMPLOYEE BENEFIT PLANS LITIGATION	))))	MDL DOCKET NO. 886

AFFIDAVIT OF BEVERLY MCKINNEY

Beverly McKinney, having been duly sworn, deposes and states as follows:

1. I am Beverly McKinney, Secretary of McKinney Trucking Co., Inc.

2. McKinney Trucking Co., Inc. is owned by myself and my husband Ed McKinney.

3. McKinney Trucking Co., Inc., hauls coal in Wise County, Virginia, and has no operations in any other state or in the District of Columbia. The operations never involved more than 3 union employes, and there are only 2 union employees at the present time.

4. McKinney Trucking Co., Inc. has never had any employees who could be eligible for benefits under the UMWA 1950 Benefit Trust.

5. In 1988, McKinney Trucking Co., Inc. entered into an agreement with the United Mine Workers of America under which the United Mine Workers agreed to waive any obligation to contribute to the UMWA 1950 Benefit Trust. McKinney Trucking Co., Inc. relied on this waiver in not making contributions to the 1950 Benefit Trust after 1988.

6. Prior to the recent demands for payment, I was not aware of any question about the validity of the waiver agreement and I had not heard of the "evergreen" clause. I have never seen the trust documents which are alleged to contain the "evergreen" clause.

7. All contracts that McKinney Trucking Co., Inc. has made with the United Mine Workers were negotiated and signed by McKinney Trucking Co., Inc. in Virginia.

8. McKinney Trucking Co., Inc. has paid all sums for it owed under its 1988 agreement with the United Mine Workers, including payments to the UMWA 1974 Benefit Trust, the UMWA 1974 Pension Trust, and the UMWA 1950 Pension Trust.

/s/ Beverly McKinney
BEVERLY MCKINNEY

STATE OF VIRGINIA

CITY OF BRISTOL

Subscribed and sworn to before me this 18th day of May, 1993, by Beverly McKinney.

/s/ Donna D. Adams
Notary Public whose
commission expires 10-31-97

No. 92-1945

IN THE

Supreme Court of the United States

October Term, 1992

THE PITTSTON COMPANY, *et al.*,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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June 11, 1993

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No. 92-1945

IN THE

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October Term, 1992

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v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' opposition ("Opp.") to the petition for *certiorari* ("Pet.") effectively demonstrates why the decisions of the lower courts in this case merit review by this Court. Nowhere do respondents deny that this case involves labor law issues of substantial importance to and impact on the United States coal industry. *See* Pet. at 11-14. And, more particularly, respondents' argument why their interpretation of the contract here does not amount to a waiver of petitioners' right to select their own bargaining representative demonstrates well why that is an important and certworthy issue.

Respondents also do not deny important aspects of the second and third questions presented by the petition. Specifically, respondents do not deny that: (1) there is substantial inconsistency in the circuits in applying this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and (2) a conflict exists among the circuits regarding the proper application of the doctrine of judicial estoppel.

I. RESPONDENTS' EFFORTS TO CHARACTERIZE THEIR INTERPRETATION OF THE CONTRACT HERE AS A BARGAINING "EXERCISE" AND NOT A "WAIVER" ONLY HIGHLIGHTS THE NEED FOR THIS COURT TO RESOLVE THAT IMPORTANT ISSUE.

Respondents do not deny that their interpretation of the contract here obligates petitioners to make contributions to the Trusts as required by collective bargaining agreements (including the 1988 NBCWA) to which petitioners are not signatories, and which were and will be negotiated by the BCOA, which is not petitioners' bargaining representative. Respondents also concede that under their construction of the contract, petitioners' employees are potentially perpetually locked into the UMWA Trusts whether or not petitioners' employees ratify a contract with different contribution terms or choose to remain members of the UMWA. *See* Pet. at 15-16. Nevertheless, respondents seek to characterize their interpretation of the evergreen clause as an *exercise* of petitioners' bargaining rights, not a *waiver* of their right to select their own bargaining representative. This is the same unavailing distinction relied on by the court of appeals in granting summary judgment.

Even accepting, for the sake of argument, respondents' definition of an exercise of bargaining rights as an agreement that fixes the parties' rights and forecloses further bargaining, it is a *waiver*, and not an *exercise*, of bargaining rights that is at issue in this case. There is no dispute that the alleged obligation to contribute to the Trusts is not a fixed obligation; rather, it is an obligation to contribute at rates *to be negotiated* by the BCOA and the UMWA. Under respondents' interpretation, the evergreen clause empowers the BCOA to negotiate future agreements on benefit issues into the indefinite future, foreclosing all employers who signed those NBCWAs from choosing their own representative for bargaining on those issues in the future.

Respondents go to great lengths to avoid the undeniable fact that the "evergreen" clause purports to delegate to the BCOA the power to negotiate on behalf of petitioners with respect to benefit

contributions. For example, respondents state that "[t]he evergreen clause is a contractual obligation which continues as long as . . . the BCOA and the UMWA *set* national contribution rates . . . ." Opp. at 5 (emphasis added). The BCOA and the UMWA do not merely *set* contribution rates—they *negotiate* the contribution rates, and they negotiate whether there will be any contributions. The respondents further characterize the contributions required under the clause as those *agreed to* in future NBCWAs. *Id.* However, the NBCWAs are collective bargaining agreements, and their terms are the result of *negotiations* between the parties. As a final example, respondents admit that the "evergreen clause is unique in that employers undertake a long-term obligation to make specified contributions" (*id.* n.3), but fail to state that the contributions "specified" are whatever rates are negotiated, from time to time, by the BCOA and the UMWA.

The fact that the so-called evergreen clause purportedly binds petitioners to contributions bargained for by the BCOA—which is not petitioners' chosen bargaining representative, and which does not even presently represent a majority of the industry—distinguishes this case from all of the cases cited in respondents' brief. In all of those cases (Opp. at 4 and n.2), the obligations of the parties were fully defined in the collective bargaining agreement. In none of those cases was any aspect left to be negotiated—*much less left to be negotiated by someone who did not represent the parties.*[1] Other than this case, we are aware

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[1] In *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991), the D.C. Circuit held that the waiver analysis did not control because the "union fully exercised its right to bargain" and eliminated any duty to bargain. *See also Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (waiver analysis does not control when the agreement "fully defines the parties' rights"); *UMWA, District 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989) (same). Respondents also attempt to obscure the waiver issue presented by this case through comparison to cases that found that an employer had a duty to provide lifetime benefits to its employees. Opp. at 5 n.3. Respondents assert that there is no reason why federal labor policy should treat the long-term obligation to provide benefits any differently than the obligation to contribute to the Trusts. Respondents again fail to make the critical distinction between agreeing to

of no decision that confers upon a party's competitors the right to negotiate critical economic issues for the indefinite future, particularly where, as here, there has been no showing of a clear and unmistakable intent to waive Pittston's right to negotiate independently.

Thus, despite respondents' claims to the contrary, this case presents an issue of waiver. Because this case does implicate waiver of the right to bargain over benefits issues, the Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), is clearly not controlling. In *Amax*, the issue was whether the union could lawfully strike a company to force it to contribute to the very Trusts at issue in this case. The dispositive issue in the case was whether the trustees were the representatives of the employers for bargaining purposes. The Court found that the trustees were *not* the bargaining representatives of the employers who contributed to the Trusts. Based on that finding, the Court properly concluded that a union strike designed to coerce an employer to contribute to the Trusts did not force the employer to accept a bargaining representative not of its choosing in violation of Section 8(b)(1)(B) of the National Labor Relations Act.

Finally, contrary to respondents' suggestion (Opp. at 7), there is a conflict in the circuits as to whether the "clear and unmistakable" waiver standard applies to the construction of a collective bargaining agreement. *See* Pet. at 14-19. This Court has never reached that important question of federal labor law.[2]

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something that is fully defined (even if it is to continue after the expiration of the collective bargaining agreement) and agreeing to be bound to something which is to be defined through future bargaining by third parties. Respondents ignore the fact that it is not the length of the obligation that petitioners contend creates a waiver; rather, it is the fact that the extent of the future obligation can be bargained for only by the BCOA—not by petitioners.

[2] Respondents argue, in the alternative, that waiver was shown below by clear and unmistakable language. Opp. at 8 n.5. However, neither lower court held the so-called evergreen clause to be a clear and unmistakable waiver of petitioners' bargaining rights. Rather, both courts erroneously avoided the issue. Furthermore, the issues of material fact that exist preclude such a finding on

In sum, respondents' artful attempt to recast their interpretation of the contract here as an exercise of petitioners' rights, rather than a waiver in perpetuity of their right to bargain for themselves, merely highlights the importance of the question presented, particularly in light of the fact (not denied by respondents) that this question affects scores of companies in the United States coal industry and their employees.

II. RESPONDENTS CONCEDE THAT THE DECISIONS BELOW PRESENT IMPORTANT QUESTIONS ABOUT THE APPLICATION OF FED. R. CIV. P. 56.

Respondents do not dispute that the courts below engaged in weighing evidence and drawing inferences against non-movants on summary judgment motions—a practice contrary to the standards of Fed. R. Civ. P. 56 and this Court's decision in *Anderson*, 477 U.S. at 242. *See* Pet. at 21-22. Respondents try to support the courts' inferences *on the merits* solely by reference to the volume of evidence submitted by respondents that conflicted with petitioners' evidence. Opp. at 8-12. That is precisely the type of summary judgment analysis that this Court rejected in *Anderson*.

Respondents, as did the courts below, gloss over their continued enforcement of withdrawal liability. Opp. at 11-12. Respondents' position in that litigation seeking withdrawal liability was necessarily dependent on the assertion that an employer that is not a signatory to the current NBCWA is *not* liable to contribute to the pension and benefit trusts. Respondents' argument that "the Trusts [have] not contradicted [their] earlier sworn statements . . . because the evergreen clause was never at issue" is a transparent attempt to mislead. Opp. at 13. The fact that the withdrawal litigation did not put at issue respondents' assertion that employers that were not signatories to the current NBCWA were *not* bound to contribute to the Trusts obviously has no bearing on whether respondents made and relied upon that assertion in that litigation. Respondents do not and cannot dispute

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motion for summary judgment.

that they took a directly contradictory position on this issue in the withdrawal liability cases.

Respondents' argument with respect to Trustee Pierce's contradictory statements also makes petitioners' point that summary judgment was inappropriate: the courts below resolved that conflict and the credibility issue it raises by determining that Pierce's statements in support of respondents outweighed his statement that supported petitioners—all without the benefit of live testimony or cross-examination. Pet. at 33a. That is plainly not in keeping with the language of Fed. R. Civ. P. 56 or this Court's decision in *Anderson*.

Finally, respondents try to play down the compelling evidence introduced by petitioners in support of their motion for reconsideration by claiming that the courts below declined to consider their evidence. Opp. at 12. Respondents are wrong. The district court considered the evidence at length (Pet. at 54a-57a and n.8), and the court of appeals both reviewed the district court's decision *de novo* and discussed that conflicting evidence. Pet. at 5a. Both courts expressly engaged in weighing that evidence. Pet. at 12a, 56a.

Both the district court and the court of appeals—as have an increasing number of federal courts (*see* Pet. at 21-22)—affirmed summary judgment by drawing inferences and weighing evidence in favor of the movant and by ignoring genuine disputes as to material facts. Moreover, both courts below disregarded the clear directive of *Anderson* that where a heightened standard of proof is involved the evidence should be viewed "through the prism of the substantive evidentiary burden" (*Anderson*, 477 U.S. at 254)—here "clear and unmistakable" waiver—and that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". *Id.* at 255.[3]

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[3] Respondents (Opp. at 8-9 n.6) gloss over the district court's conclusion that "although the Court considers the Trusts' contradictory positions to be some evidence that the evergreen clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly *outweighed* by the other evidence before the Court". (Pet. at 46a, emphasis

Respondents concede that the decisions below were entirely based on a weighing of the evidence in favor of movant and content themselves with an effort to satisfy this Court that respondents' evidence outweighed petitioners'. Respondents also concede that many other courts—disregarding *Anderson*--engage in weighing evidence and drawing inferences in favor of movants on summary judgment motions. *See* Pet. at 21-22. Those concessions, the record, and the decisions below demonstrate that this case and questions it raises relating to Fed. R. Civ. P. 56 merit review by this Court.

III. RESPONDENTS CONCEDE THAT THE CIRCUITS ARE DIVIDED WITH RESPECT TO THE DOCTRINE OF JUDICIAL ESTOPPEL.

The record below establishes that, over the ten-year period following the 1978 NBCWA, respondents repeatedly and successfully asserted in other litigations that signatories to the relevant NBCWAs had *no* continuing obligation to contribute to the Trusts if they had not signed the subsequent NBCWAs. Respondents' position in those other litigations is directly contrary to respondents' theory in this case. Notably absent from respondents' opposition is any denial that they took this directly contrary position consistently, repeatedly and successfully in other litigations.

Moreover, respondents concede that a conflict exists among the circuits on the issue of judicial estoppel. Respondents do not even attempt to dispute that the doctrine of judicial estoppel has been inconsistently applied, leading to conflicting results. Nor do they dispute that, while the doctrine of judicial estoppel has explicitly been rejected by the Tenth and D.C. Circuits, it has been embraced in varying forms by the First, Fourth, Fifth and Eleventh Circuits. Pet. at 24-25. Thus, respondents cannot dispute that guidance from this Court is necessary to resolve this conflict.

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supplied.) That is what the district court held. It is contrary to *Anderson* and is not an appropriate basis for granting summary judgment.

Respondents also do not directly dispute that, in rejecting petitioners' defense based on judicial estoppel, both lower courts improperly disposed of compelling evidence establishing the existence of disputed material facts. Respondents concede that judicial estoppel was intended to "bar inconsistent representations with respect to the same facts or claims". Opp. at 13. But respondents argue that their construction of the NBCWA in the withdrawal cases—that a signatory that failed to sign the subsequent NBCWA had no obligation to contribute to the Trusts and was therefore subject to withdrawal liability—does not constitute the same "facts or claims" as their position here—that while petitioners failed to sign the 1988 NBCWA and instead reached an independent agreement with the UMWA, petitioners were still obligated to contribute to the Trusts at the rates set forth in the 1988 NBCWA. That argument is simply untenable. The presence of contradictory constructions of the same contract is the paradigm situation requiring the application of judicial estoppel.

Respondents oddly assert that cases cited by petitioners support *their* point that judicial estoppel does not apply to this case because it does not "bar litigants from urging different . . . positions in cases involving unrelated parties". Opp. at 13. Respondents are wrong. For example, *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548-49 (7th Cir. 1990), which respondents cite, involved an attempt by one party to prevail in a suit on a position inconsistent with one which was the basis for victory in a previous suit against a *different* party. The Seventh Circuit applied the doctrine of judicial estoppel to block that party from prevailing in the second suit on the basis of that inconsistent position. *Id.* In *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993), the Seventh Circuit also used judicial estoppel to bar a litigant from prevailing on the basis of a position inconsistent with one taken in a previous case against an *unrelated* party.[4]

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[4] And while *Delgrosso v. Spang & Co.*, 903 F.2d 234 (3d Cir.), *cert. denied*, 498 U.S. 967 (1990), involves inconsistent positions in the same proceeding, it embraces judicial estoppel as a doctrine applicable to a party assuming inconsistent positions in separate proceedings: "To permit a party to

In short, respondents do not and cannot dispute that there is a deep conflict in the circuits on the existence and application of the doctrine of judicial estoppel. And, contrary to respondents' suggestion, their past conduct—the repeated, successful pursuit of a contract interpretation necessarily inconsistent with their theory here—squarely presents the question whether the doctrine of judicial estoppel applies in this case.

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assume a position inconsistent with a position it had successfully relied upon in a past proceeding 'would most flagrantly exemplify . . . playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate'". *Id.* at 241, quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' opening brief, the petition for a writ of *certiorari* should be granted.

June 11, 1993

Respectfully submitted,

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No. 92-1945

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE PITTSTON COMPANY, ET AL., PETITIONERS

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly determined that the "evergreen clause" to which petitioners agreed in the National Bituminous Coal Wage Agreements ("NBCWAs") of 1978, 1981, and 1984 requires petitioners (and other similarly situated employers) to continue contributions to the respondent multiemployer pension and health plans for as long as successor NBCWAs require such contributions.

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc. ("BCOA"), as *amicus curiae* in support of respondents.[1]

INTEREST OF BCOA AS AMICUS CURIAE

On June 3, 1993, BCOA filed a brief as *amicus curiae* in opposition to the petition filed by Rawl Sales and Processing Company seeking review of the same court of appeals decision that petitioners attack here. *See Rawl Sales and Processing Co. v. United Mine Workers of America 1974 Pension Trust*, No. 92-1775. BCOA respectfully refers the Court to that brief for a statement of BCOA's interest in these proceedings.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

BCOA respectfully refers the Court to the Statement of the Case in its brief in *Rawl*. In that Statement, BCOA described the historical background of the evergreen clause and the reasons for its negotiation and adoption. Although petitioners (collectively "Pittston") ignore the subject, an understanding of the problems that the evergreen clause was designed to address is essential to a proper interpretation of the clause. We therefore adopt here the Statement set forth in our *Rawl* brief.

ARGUMENT

Together, Rawl and Pittston have orchestrated an intricate procedural ballet intended to take advantage of the summer recess of this Court and the 30-day stay of mandate secured by petitioners in the court of appeals. Although the district court remained free during the period of this interlocutory appeal to conduct any further proceedings needed to calculate the precise amount owed by Pittston and Rawl, the district court announced at the time that it authorized the interlocutory appeal under 28 U.S.C. § 1292(b) that it would not proceed further until the appeal was resolved. Pittston and Rawl now hope to use their petitions in this Court as a basis for arguing to the district court that it still should not go forward, and they have timed the filing of their petitions in an effort to forestall action in this Court until the beginning of the next Term.

To a significant degree, Pittston recapitulates many of the factual and legal assertions made by Rawl and, as to those matters, all of the arguments made in BCOA's *Rawl* brief remain applicable. BCOA files this brief only to reply to additional points newly made or emphasized in Pittston's petition.

1. Since the beginning of this litigation in 1988, Pittston has steadfastly opposed the Trustees' interpretation of the evergreen clause, the interpretation endorsed

by the district court and confirmed by the court of appeals. What Pittston has *not* done—and what it does not do even now—is offer any plausible alternative construction of the clause that does not render it mere surplusage. Throughout a motion to dismiss, a two-year discovery period, a district court decision on the merits, a motion for reconsideration, a decision from the court of appeals, a petition for rehearing and a suggestion for rehearing *en banc*, and a petition for certiorari, Pittston has yet to articulate its own interpretation of what the evergreen clause means or why the bargaining parties agreed to it in 1978. At most, Pittston has suggested that the clause means that employers must make the contributions that they have agreed to make. But this is a tautology and would make the evergreen clause unnecessary. If Pittston were correct, the evergreen clause could be deleted in its entirety without any real-world effect. The courts below properly rejected this view.

Rather, as the district court and the court of appeals both held, the evergreen clause obligates any employer accepting it to continue making contributions to the Funds for as long as such contributions are required in that NBCWA or any successor NBCWA. This construction—which the court of appeals correctly called the only reasonable construction—is the only reading that gives the clause force and effect. It does not warrant further review.

2. As BCOA explained in its *Rawl* brief, this case is one of contract interpretation, pure and simple. Relying on notions of waiver and estoppel, Pittston has struggled to remove this case from the realm of ordinary contract interpretation and to place it in a different legal category. These efforts are unavailing.

In many ways, Pittston's argument is more notable for what it fails to say than for what it says. Pittston has not argued that an employer is prohibited, as a matter

of federal labor law, from agreeing to a clause that embodies a continuing obligation of the sort found by the courts below. Nor does Pittston argue that the evergreen clause, as interpreted by the Trustees and the courts below, is an implausible means of accomplishing the bargaining objective identified by BCOA in 1978, or that the bargaining objective of maintaining the broadest possible funding base for a multiemployer benefit plan was the least bit improper or unreasonable for BCOA to pursue at that time. Instead, Pittston simply insists that the evergreen clause does not mean what it says. First, last, and always, this is a case of contract interpretation, not waiver, estoppel, or any more obscure theory.

3. Pittston asserts that the Funds' motion for summary judgment was based "upon extrinsic evidence created thirteen years after the 1978 negotiations and solely for the purposes of this litigation." Pet. 5. This statement is highly misleading. Pittston conveniently ignores what the court of appeals expressly relied upon: the voluminous *contemporaneous* evidence of the negotiating parties' intent in agreeing to the evergreen clause including: "copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation," "various BCOA and UMWA documents prepared shortly after the negotiations were concluded" evincing the same intent, and "public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation." Pet. App. 7a-8a. Similarly, Pittston has apparently forgotten that soon after the evergreen clause was negotiated, Donald Pierce—then a UMWA economist and negotiator, later a Fund Trustee, and now the Funds' Executive Director—testified before Congress in public hearings on legislation that became the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"). Mr. Pierce described the evergreen clause, the factual background leading to its

negotiation, and the reason it was negotiated. Both courts below expressly relied on this evidence. Pet. App. 8a, 30a-31a.

Moreover, Pittston's attempt to discredit the declarations submitted by the Trustees in support of their motion for summary judgment employs a rather obvious and unjustifiable double standard. The Trustees' declarations were submitted *before* the district court rendered its decision; the affidavits on which Pittston now seeks to rely were prepared, for litigation purposes, only *after* Pittston had already lost in the district court and was seeking reconsideration.

4. In a similar vein, Pittston charges that before this litigation began, BCOA "engaged in conduct that was directly contrary" to the Trustees' interpretation of the evergreen clause. Pet. 5. The allegation is made, not surprisingly, without citation to the record. It is similarly unsurprising that Pittston does not bother to identify any conduct by BCOA that allegedly substantiates the claim. In fact, the undisputed record before the district court and the court of appeals established that in November 1985, soon after companies like Pittston began attempting to shed their health and pension benefit obligations by negotiating special deals with the UMWA purporting to establish reduced contribution rates, BCOA wrote a nine-page single-spaced letter to the Trustees of the Funds explaining in great detail the purpose, negotiating history, and intent of the evergreen clause and explicitly informing the Trustees that the clause, in fact, means what it says.[2] BCOA has *always* insisted that companies like Pittston are bound by their promises, and Pittston has cited *no* evidence to the contrary either in this Court or below.

5. Pittston asserts that in *Garland Coal and Mining Co.*, NLRB Case No. 16-CA-9999 (1981), "the NLRB

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[2] This letter was before the district court as an exhibit to a pleading in one of these consolidated cases and was provided by BCOA to the court of appeals as an attachment to its brief. We have lodged a copy of this brief with the Clerk of this Court.

. . . confronted the evergreen clause" and "concluded that employers [had] no obligation to contribute to the Trusts [under that clause] after the agreement expires." Pet. 5 n.3. This assertion is false for a number of reasons. First, the National Labor Relations Board never considered the *Garland Coal* case or "confronted" the evergreen clause; Pittston refers not to a decision of the Labor Board but to a decision of an NLRB Regional Director in declining to issue a complaint. The decisions of a Regional Director have no precedential value, *Miller Brewing Co. v. Brewers Local 9*, 739 F.2d 1159 (7th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 1160 (1985), and are entitled to no deference. Moreover, the Regional Director's letter in which Pittston places such reliance does not mention the evergreen clause and there is no indication that the Regional Director considered it in deciding not to issue a complaint. Finally, the conclusion reached by the Regional Director was merely that there is no contractual obligation to contribute to the Funds "during a contract hiatus," *i.e. between the expiration of one NBCWA and the execution of its successor.* J.A. 1000. Rather than undercutting the court of appeals' plain reading of the evergreen clause, this conclusion is fully consistent with the interpretation of the clause advocated by the Funds and BCOA and endorsed by the courts below; employers are contractually obligated to contribute to the Funds during the term of the NBCWA to which they are a signatory and *any successor* NBCWA. During any hiatus *between* agreements, there is no NBCWA extant and, accordingly, no contractual obligation to contribute.

6. Pittston cavalierly asserts that the courts below ignored what it calls "substantial evidence" supporting its "interpretation" of the evergreen clause. Both the district court and the court of appeals correctly found, however, that there was no such substantial evidence and that Pittston failed altogether to counter the detailed, volumi-

nous, and overwhelming evidence provided by the Funds from *both* sides of the negotiating table. Pet. App. 8a; *see also*, Pet. App. 31a (Pittston adduced "virtually *no* evidence to rebut the Trusts' showing of intent") (emphasis in original). Even the affidavit evidence submitted by Pittston to the district court *after* Pittston lost on summary judgment failed to rebut the points made by the Trustees. The Funds explained, meticulously and with voluminous evidentiary support from both sides of the negotiating table, precisely what both parties to the negotiations intended, described in detail the back-and-forth progress of negotiations, and provided a comprehensive explanation, from the individuals directly involved in negotiations, of what the evergreen clause was designed to do. In response—and then only in seeking reconsideration —Pittston submitted affidavit testimony from officials of Rawl and Pittston to the effect that no one told "them nor were they aware that" the evergreen clause meant what it said. Pet. 8-9. Such affidavits, however—proclaiming ignorance of the meaning of the evergreen clause—cannot controvert the detailed explanations of both negotiating parties as to what actually occurred at the bargaining table. Simply put, the Funds explained what the clause was negotiated to accomplish; Pittston responded by explaining that its employees were unaware of any such purpose. As the court of appeals properly held, "[t]his evidence falls far short of what is necessary to undermine or contradict the Trustees' evidence." Pet. App. 10a.

7. Having mischaracterized the evidence below, Pittston invites this Court to revisit the standards for granting summary judgment, which the Court addressed at some length in the 1986 summary judgment trilogy: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Pittston's invitation should be declined because the court of appeals' decision is consistent with those de-

cisions. As this Court carefully explained in *Anderson*, *Celotex*, and *Matsushita*, summary judgment may not be avoided merely by raising a "metaphysical doubt as to the material facts" or by pointing to a scintilla of evidence supporting the claims of the non-moving party. *Matsushita*, 475 U.S. at 586; *Anderson*, 477 U.S. at 252. If the evidence supplied by the non-moving party "is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. The trial court must evaluate the competing presentations of the parties, *i.e.*, "pierce the pleadings and . . . assess the proof in order to see whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587 (citation omitted). Summary judgment is warranted if the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. Pittston's evidence was insufficient in quantity or quality to support a jury verdict, and judgment for the Funds was entirely appropriate.

8. Pittston insists—as did Rawl—that there is a fundamental inconsistency between the language in Article XX(d) of each NBCWA (which establishes contribution rates and provides that those rates apply only for the term of that NBCWA) and the evergreen clause obligation to make contributions as required by *successor* NBCWAs. The court of appeals aptly noted that the two provisions are complimentary, not contradictory; the first establishes the contribution rates that apply during the term of a particular NBCWA, and the second establishes an obligation to contribute under successor NBCWAs. Pet. App. 6a. There is no inconsistency.

9. A principal thrust of Pittston's brief is that in four or five cases since 1978 (culled from the many hundreds of delinquent pension contribution cases filed by the Trustees during that time), the Trustees have asserted a right to "withdrawal liability" under the MPPAA, 29 U.S.C. §§ 1381 *et seq.*, without regard for the evergreen

clause. Because, under the statute, withdrawal liability arises only after the contribution obligation terminates, Pittston believes it can put these cases to two uses. First, Pittston argues that the cases suggest that at an earlier point in time, the Trustees held a different view of the evergreen clause than they assert in this litigation, and second, Pittston contends that the cases form the basis for application of the doctrine of judicial estoppel. The cases cannot properly be put to either use.

First, none of the cases cited by Pittston involved the evergreen clause. None of the cases contained any allegations, discussions or adjudication regarding the meaning of the evergreen clause and none of the cases presented the kind of problem that the evergreen clause was designed to address, *i.e.*, a financially viable coal company withdrawing from the Funds and leaving its health and pension obligations behind for its competitors to fund. Instead, the employers involved in the withdrawal liability cases were going out of business and, once coal production had ceased, would have had no contribution obligation at all. None of those employers had negotiated a special contribution rate with the Union in violation of the evergreen clause. In these circumstances, the Trustees properly recognized that for an employer going out of business, the fund's remedy was withdrawal liability.

At most, Pittston has identified a few isolated instances in which the evergreen clause could have been, but was not, asserted in circumstances very different from those presented here. Instead of seeking a few weeks or months of additional contributions under the evergreen clause and *then* asserting withdrawal liability against these bankrupt employers, the Trusts in a small number of cases claimed withdrawal liability immediately. On this basis, Pittston seeks complete absolution for all of its evergreen clause liability. As the district court and the court of appeals properly held, there is no basis for awarding Pittston such an immense windfall; Pittston, of course,

was not involved in any of the cases on which it now relies, and there is no evidence that it even knew of these cases at the time they were decided, much less that it relied on them in ordering its business affairs. There is *no* evidence that in filing the cases cited by Pittston, the Trustees were affirmatively asserting a view of the evergreen clause different from that posited here.

For similar reasons, these cases cannot provide a proper basis for the application of judicial estoppel, even assuming, for the sake of argument, that the common law doctrine retains vitality in this era of pleading in the alternative. As the court of appeals noted, even those circuits willing to apply the doctrine use it only "to preclude a party from taking a position that is inconsistent with one successfully asserted by the same party in a prior proceeding. . . . Since the present case involves wholly distinct issues and facts from those of the withdrawal liability cases, the Trustees have not been required to contradict earlier sworn statements or present conflicting interpretations of the evergreen clause to successive tribunals." Pet. App. 13a (citations omitted). At most, the court held, the Funds had, in good faith, asserted alternative theories of liability against different defendants in different cases involving different facts. *Id.* at 14a. Because this case presents no occasion to apply the judicial estoppel doctrine, it is a vehicle ill-suited for determining the propriety of that doctrine's use in the federal courts.

10. Pittston relies heavily on a comment made by Trustee Donald Pierce at a meeting of the Board of Trustees of the UMWA Funds in 1988. Although Pittston only paraphrases the comment, the petitioner declares that Mr. Pierce indicated in the comment that he "believed that coal companies that were signatories to the 1978, 1981, and 1984 NBCWAs did not have a continuing obligation to pay into the Trust." Pet. 8. As a check of the joint appendix citation provided by Pittston con-

firms, the Pierce statement was quite different from its portrayal in the petition. In fact, Trustee Pierce merely expressed the view, not that the evergreen clause means something other than what the Funds now maintain, but that there may be *legal* questions about the clause's enforceability. The record also discloses that Mr. Pierce's fears were not shared by other Trustees. J.A. 921-926.

11. Pittston also attempts to make mileage from the contractual withdrawal liability provision (Article XX (i)) in the 1988 NBCWA. Pittston suggests this provision would have been "superfluous" had the Trustees' current interpretation of the evergreen clause been extant in 1988. In fact, the contractual provision in Article XX(i) is no more than a supplement to the evergreen clause. By its terms, the evergreen clause has no effect if there is no successor NBCWA or if a successor NBCWA does not provide for contributions. In that situation, there would be no evergreen obligation and the contractual withdrawal liability provision would take over. The clause is in no way inconsistent with the decisions below. More fundamentally, as the court of appeals correctly held, evidence purportedly illuminating the intent of the bargaining parties in negotiating the *1988* NBCWA is irrelevant to the intent of the parties in negotiating the *earlier* agreements at issue in this case. Pet. App. 9a n.8. On this latter score, Pittston has not been able to unearth even a scintilla of evidence supporting its view, even after five years of litigation.

12. Pittston decries the "untested" nature of the declarations submitted by the Funds and relied upon by the district court and the court of appeals. Judge Hogan properly put this argument to rest in the district court. As Judge Hogan pointed out, Pittston "had at least two years to conduct discovery." Pet. App. 26a n.11; *see also id.* at 28a n.15. Pittston took no deposition discovery during that period. If the declarations upon which the

Funds relied went "untested," Pittston has no one to blame but itself. Moreover, as the district court observed,

> There is no reason that defendant employers should not have been able to find evidence of contrary negotiating history, if any was there to find. The UMWA has been actively involved in these cases from the very beginning, as *amicus curiae* in the *Pittston* and *Rawl* cases . . . . The UMWA was a negotiating party when the evergreen clause was agreed to in 1978. Certainly if the UMWA had evidence that the clause was not intended to create a continuing obligation, it would have introduced such evidence in these cases.

Pet. App. 31a n.17.

13. Pittston argues that as a result of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 3037-3056 ("Coal Act"), BCOA will "receive potentially all of the proceeds of the evergreen litigation." Pet. 12 n.6. In fact, neither BCOA nor any of its members will receive any "proceeds" from this litigation. Due to the failure of Pittston and other employers to make contractually mandated contributions to the Funds, the two health benefit trusts now merged into the Combined Fund had reportedly amassed a deficit of approximately $60 million as of February 1, 1993. Under Section 9704(i)(1)(B) of the Coal Act, 106 Stat. 3045, if this deficit is not eliminated through other collections, such as the recovery of delinquent contributions from employers like Pittston, it must be eliminated by signatories to the 1988 NBCWA including, but not limited to, members of BCOA. Accordingly, vindication of the contractual obligations at issue in this case—and the resulting payment of the amount owed by Pittston to the benefit trusts—will reduce on a dollar-for-dollar basis the amounts that the Combined Fund Trustees will seek to collect from *all* employers signatory to the 1988 NBCWA.

14. Rawl attempted to convince this Court that it was a mom-and-pop operation unfairly victimized by the

largest members of BCOA; incredibly, Pittston makes the same claim. This, of course, is nonsense. Pittston, or more precisely, "The Pittston Companies," together constitute the 18th largest producer of bituminous coal in the United States.[3]

15. By alluding to "similar actions" involving the evergreen clause, Pittston attempts to persuade this Court that this case is merely the leading crest of a tidal wave of "evergreen' litigation. Pet. 12 n.5. In fact, the evergreen clause is involved in a total of nine cases. These cases involve the interpretation of a single clause in a single series of collective bargaining agreements applicable to a single industry. The applicability of that clause has been limited by the Coal Act, which evinces Congress' preference for a statutory solution to the problem of retiree health benefits and terminates Pittston's contractual evergreen liability (and that of all other employers) to the 1950 and 1974 Benefit Trusts. This case represents the straightforward interpretation of a *sui generis* contract applicable to only one industry. It poses no issue worthy of certiorari.

16. Pittston decries the "unfair[ness]" of the court of appeals' decision which, it is argued, "saddle[s] petitioners with enormous liabilities." Pet. 13. To the contrary, the decision of the court of appeals says one thing and one thing only: Pittston must abide by its contractual agreement to provide funding for the health and pension benefits received by hundreds of its retirees and for the "orphan" retirees Pittston agreed to support. In order to fund those benefits, the court of appeals has required Pittston to make contributions to the industry-wide multiemployer Funds on the same basis as its industry competitors. There is nothing illogical, unusual, or unfair about that result. Indeed, permitting Pittston to shift to its competitors the cost of funding health and

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[9] Michael deCourcy Hinds, *Bitter Coal Strike May Be At End*, N.Y. Times, December 23, 1989, at A1, col. 1.

pension benefits for *Pittston's own retirees* would be grossly unfair and contrary to the bargain Pittston made in 1978.

17. Without citation, Pittston asserts that the district court "agreed that respondents' interpretation of the evergreen clause amounted to a waiver of petitioners' right to bargain for themselves . . . ." Pet. 16. The district court never concluded that the evergreen clause was anything other than a contractual commitment to provide benefits as required in successor NBCWAs. Although the district court described Pittston's waiver argument, it never agreed with the claim.

18. Pittston cites a number of cases assertedly demonstrating that "[e]very . . . circuit [with the exception of the D.C. and Seventh Circuits] consistently applies the waiver doctrine." Pet. 17-18. Although the cases cited by Pittston arose in a variety of differing factual settings, they share two fundamental characteristics missing from the present case. First, in each of the cited cases, the parties to the agreements in question ended up in court because they disagreed vehemently over the meaning and intent of their bargain; here, negotiators from *both sides* of the collective bargaining table have acknowledged pursuing the same goal and they agree, without dissent, to the same interpretation of their contract. Their testimony in this regard went wholly unrebutted by Pittston. Second, and more fundamentally, in the present case, all parties to the litigation acknowledge that the bargaining parties—the UMWA and BCOA—bargained at some length about, and ultimately agreed upon, a contract term establishing the extent and the duration of the employers' contribution obligations. No one in this case suggests that the topic at issue went unaddressed by the parties at the negotiating table, as in *NLRB v. Challenge-Cook Bros. of Ohio Inc.*, 843 F.2d 230 (6h Cir. 1988), and *Universal Security Instru. Inc. v. NLRB*,. 649 F.2d 247 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981), that the parties agreed to leave resolution of the problem to the unilateral action

of one of the bargaining parties, as in *Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120 (3d Cir. 1983), *Challenge-Cook, supra,* and *Universal Security, supra,* or that the failure of the parties to arrive at a negotiated solution warrants an inference of waiver, as in *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562 (10th Cir. 1993), and *United Brotherhood of Carpenters & Joiners Local 2848 v. NLRB*, 891 F.2d 1160 (5th Cir. 1990). All parties here concur that an agreement *was* reached between BCOA and the UMWA as to the duration of the contribution obligation of all signatory employers. The *sole* question posed in *this* case is what that agreement was. "[W]here the matter is covered by a collective bargaining agreement, the [parties have] *exercised* [their] bargaining right and the question of waiver is irrelevant." *Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992) (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 14, 1993

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PITTSTON COAL GROUP COMPANIES,
Petitioners,
v.
UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ASSOCIATED ELECTRIC COOPERATIVE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF ASSOCIATED ELECTRIC COOPERATIVE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted by Associated Electric Cooperative, Inc. ("AECI") as amicus curiae in support of petitioners.[1]

INTEREST OF AECI AS AMICUS CURIAE

The Trustees' assertion that the Court of Appeals' interpretation of the evergreen clause will have no effect outside the limited sphere of unionized bituminous coal

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

mining is incorrect.[2] To the contrary, the Court's decision imposes unanticipated obligations on electric power generators such as AECI.

AECI is a rural electric power cooperative established and incorporated in 1961 under the laws of the State of Missouri. AECI is the wholesale firm power supplier to six regional generation and transmission cooperatives, which in turn supply wholesale power to forty-three distribution cooperatives. These distribution cooperatives serve at the retail level over 1.2 million consumer members in rural Missouri and much of southeastern Iowa.

AECI operates two power generation plants in Missouri at New Madrid and Thomas Hill. These power plants are coal-fired. That is, they burn coal in cyclone boilers to produce steam and, ultimately, electrical energy. During its history AECI, like many other electric power generators, has owned bituminous coal mines to produce coal for its own use. It also has purchased coal from unaffiliated coal mining companies. From 1980 until the end of 1992, AECI owned and operated bituminous coal mines adjacent to its Thomas Hill plant. When AECI acquired these coal mining operations, it became bound by the 1978 National Bituminous Coal Wage Agreement ("NBCWA") as the successor to the prior signatory operator. AECI signed so-called "me-too" agreements in 1981, 1984 and 1988.

The NBCWAs required contributions to the respondent UMWA Trusts, not only for bituminous coal produced and hours worked by UMWA employees, but also for any bituminous coal purchased by a signatory or me-too

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[2] Brief in Opposition to the Petition for a Writ of Certiorari in *Rawl Sales and Processing Company v. Trustees, UMWA 1950 Pension Trust, et al.*, No. 92-1775 at 6. *Rawl Sales* was consolidated with the instant case in the Court of Appeals. The Court of Appeals' judgment was the same in both cases.

company. As a result of the decision of the Court of Appeals, AECI is subject to a potentially perpetual obligation to contribute to the Trusts at rates negotiated by the BCOA for work performed by UMWA-represented employees at its non-operational mines and, absent a judicial holding that the purchase of coal clause is illegal, for any bituminous coal it purchases, notwithstanding that it is no longer in the coal mining business and is not a member of BCOA.

The Court of Appeals' decision will have a substantial impact on many members of the electric power industry. More than half the electric power plants in the United States are coal-fired and these power plants are perforce either coal mine operators, coal purchasers or both. *Annual Energy Outlook 1993*, Energy Information Administration, U.S. Department of Energy (Dec. 1992) at 49. Thus, the issues presented by the Petition have implications for collective bargaining in the electric power industry and for the ultimate cost to tens of millions of consumers of electricity.

ARGUMENT

Article XX(d)(1) of the NBCWAs required signatory and me-too operators to make contributions to the UMWA Trusts based on tons of coal produced and to contribute on a "cents per hour" basis for certain work performed by UMWA employees. In addition, Article XX(d)(1)(v), the so-called "purchase of coal" clause, required contributions based upon tons of bituminous coal purchased by a signatory or me-too company, for which contributions had not already been made under Article XX(d)(1).[3]

[3] Although the Court of Appeals' decision specifically addressed the impact of the evergreen clause on the per-ton contribution requirement of Article XX(d)(1), the Trustees have contended that their evergreen theory applies equally to Article XX(d)(1)(v). *See Associated Electric Cooperative, Inc. v. Holland*, C.A. No. 93-0944-HHG (D.D.C.).

Although AECI is entirely out of the business of mining bituminous coal, it continues to employ some UMWA workers in land reclamation projects. Under the Court of Appeals' reading of the evergreen clause, AECI must continue to make pension contributions for these employees at BCOA-negotiated rates, even though: (1) AECI may never agree to another NBCWA; (2) AECI is no longer engaged in the production of coal; and (3) AECI is not a member of BCOA. When AECI assumed the obligations of the 1978 NBCWA, it did not know that it would be deemed to have waived forever its right to select a bargaining representative other than BCOA to bargain with the union on the critical issue of pension benefits for these workers.

Likewise, given the Court of Appeals' interpretation of the evergreen clause, under Article XX(d)(1)(v), AECI is required to continue, potentially in perpetuity, to make contributions to the Trusts at BCOA-negotiated rates for every ton of bituminous coal it purchases to fire its power plants [4]—whether or not it ever signs another NBCWA. When AECI assumed the obligations of the 1978 NBCWA, it did not know it was subjecting itself to a perpetual obligation to make pension contributions for people who are not its employees, based on bituminous coal it purchased after it ceased mining operations, and at rates set in the future by the BCOA.

AECI's situation is not unique. Over 86 percent of the coal consumed in the United States today is used by electric utilities. "The U.S. Coal Industry, 1970-1990: Two Decades of Change," Energy Information Administration, U.S. Department of Energy (Nov. 1992) at 101.

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[4] In order to comply with the Clean Air Act, AECI's plans for the future include a switch to non-bituminous, low-sulphur Western coal. However, AECI also has retained title to its Missouri bituminous coal reserves. If AECI mines or buys bituminous coal at any time in the future, the Court of Appeals' decision would require contributions to the Trusts.

Electric utilities accounted for virtually all of the growth in U.S. coal consumption between 1970 and 1990. *Id. See also*, "Annual Energy Outlook 1993", Energy Information Administration, U.S. Department of Energy (Dec. 1992) at 61, 65. Conversely, coal holds a dominant share of the electric power fuel market. Slightly more than half of all operating power plants burn coal and the 54 largest electric power plants currently on utilities' drawing boards are coal fired. "Inventory of Power Plants In the United States, 1991", Energy Information Administration, U.S. Department of Energy (Oct. 1992) at 1.

The interdependence of the coal and electricity markets is expected to continue into the next century. The Energy Information Agency projects an increased demand for electricity between the present and 2010 and, as a result, a marked increase in coal production. "The U.S. Coal Industry, 1970-1990" at 59-61. For now and into the foreseeable future, most contributions made to the Trusts under the purchase of coal clause will be made by members of the electric power industry. Most of these companies, under the Court of Appeals' rationale, will be forced to pay pension and benefit contributions, not for their own employees and not because they agreed to make such contributions, but rather to offset the contributions that by contract should be paid by BCOA member companies. This is not, as the Trustees contend, a case of limited import that affects only a small number of coal mine operators. The decision of the Court of Appeals amounts to the imposition of huge obligations on the electric utility industry which in turn will be borne by millions of consumers of electric power.

CONCLUSION

For these reasons set forth by Petitioners and for the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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